Supreme Court, U.S.
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No. 10-327

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In The Supreme Court of the United States

MARK CAPENER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Under the fee-shifting Hyde Amendment (Pub. L. No. 105-119, Title VI, § 617, 111 Stat. 2519 (November 26, 1997), codified as 18 U.S.C. § 3006A note), when is a fee award to a prevailing criminal defendant authorized under the statutory standard that the "position of the United States was vexatious, frivolous, or in bad faith"? In particular:

(a) Is either "vexatious" or "frivolous" assimilated with a "probable cause" standard similar to that utilized under the Fourth Amendment or in Grand Jury proceedings?

(b) Is "vexatious" redundant in whole or in part with "frivolous" or "bad faith," or does "vexatious" refer to the manner in which the criminal proceeding was conducted?

(c) Does "position of the United States" exclude consideration of the government's retained private expert analysts or witnesses who engaged in activity otherwise within the meaning of "vexatious, frivolous, or in bad faith," had they been performed by government employees?

(d) Is the government privileged under Hyde to present a theory of prosecution that is specifically excluded by the underlying criminal charging statute?

2. Under the fee-shifting Hyde Amendment (cited above), does the statutory cross-reference to "the procedures and limitations (but not the burden of

proof) provided for an award under section 2412 of title 28" preclude or limit the prevailing defendant's access to ordinary civil discovery procedures in support of his Hyde motion?

3. Is the Ninth Circuit's recently reformulated standard of "clearly erroneous" review, as enunciated in *United States v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009)(en banc), and applied in this case to set aside the district court's findings of fact, consistent with the ruling decisions of this Court, and particularly with *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985)?

List of Parties

All parties to the proceeding below are listed in the caption. There are no corporate parties.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2010

No. 10-

MARK CAPENER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Mark Capener respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The original opinion of the court of appeals (1a-27a),[1] is reported at 590 F.3d 1058 (9th Cir.

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[1] Citations to "-a" are to pages of the appendix to this petition. Citations to "DD-" are to the document number of documents contained in the docket of the

2010). The amended opinion of the court of appeals, issued in connection with its denial of rehearing and rehearing en banc (28a-55a) is reported at 608 F.3d 392 (9th Cir. 2010). The relevant district court opinion and order (56a-66a) is unreported.

Jurisdiction

The judgment of the court of appeals was entered on January 10, 2010 (1a). An order denying rehearing and rehearing en banc was entered on June 9, 2010 (28a-29a), in connected with the issuance of the amended opinion of the court of appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statute Involved

The principal statute involved in this case is the fee-shifting[2] Hyde Amendment, Pub. L. No. 105-

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district court (no. 3:05-0114-RCJ-RAM). Citations to the Excerpts of Record in the court of appeals are to pages of the following: "ER" for the government's excerpts of record; "SER" for the defendant's supplemental excerpts of record; "GFER" for the government's further excerpts of record; "DFER" for the defendant's further excerpts of record.

[2] We refer to the statute involved as the "fee-shifting" Hyde Amendment in order to distinguish it from other legislation also popularly known as the "Hyde Amendment," such as the provision regarding the public funding of abortion services. This case does not involved abortion.

119, Title VI, § 617, 111 Stat. 2519 (November 26, 1997), codified as 18 U.S.C. § 3006A note, which provides in full as follows:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision

> to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

STATEMENT OF THE CASE

This case stems from an unjustified federal criminal prosecution against a physician, attacking his lawful practice of medicine. What is distinctive about the case–but neither unique nor unusual in current prosecutorial practice–is that the prosecution never had any basis in evidential fact. Instead, the case was instigated on statistical analysis and pressed through trial on unfounded speculation masquerading as expert opinion, assisted by a violation of the government's discovery obligations, which unfairly surprised the defense on the first day of trial, and further multiplied the costs of defense.

In practical effect, the government's prosecutorial approach shifted the burden to the defendant of proving his innocence. This he did, ultimately obtaining a judgment of acquittal on all 52 counts charged against him, but at enormous effort and expense, incurring some $1.4 million in attorneys' fees and other defense costs. Even so, the government very nearly accomplished its goal of convicting the innocent on false stories made up by "experts," and it did achieve its goal of destroying most of the defendant's financial net worth.

In 1997, Congress enacted the fee-shifting Hyde amendment precisely to provide some recompense to such victims of unjustified federal criminal prosecution. In this case, the district court applied that statute to make a partial award to the defendant, on a finding that the government's case was frivolous in part. The court of appeals reversed that award because it viewed the evidence differently from the district court. While the court of appeals' application of clear error doctrine is deviant, its crabbed construction of the fee-shifting Hyde amendment continues a pattern of outcomes in the lower federal courts. Though the lower courts disagree on the meaning of key provisions of the statute, they are mostly hostile to the Congressional purpose of providing relief to the unjustly prosecuted.

The fee-shifting Hyde Amendment is an important federal remedial statute that has never been construed by this Court, and has produced divisions of authority in the lower courts. But most fundamentally, the lower courts' interpretations have frustrated the Congressional intent to restore balance and fairness to the federal prosecution function. This Court should grant certiorari to resolve these problems.

Statement of Facts: The Underlying Criminal Prosecution

Dr. Mark Capener–the Petitioner here, and defendant below–is a duly licensed physician specializing in Ear, Nose, and Throat (ENT) surgery. In 1999, following the completion of his specialty

training in Buffalo, New York, Dr. Capener moved to Elko, Nevada, and set up his practice there, at the invitation of a local hospital. Unbeknownst to Dr. Capener at the time, he had been placed in the middle of a "civil war" within the local medical community.[3] Prior to Dr. Capener's arrival, there had been no resident ENT surgeons in the Elko area, which had been served by a group of entrenched physicians resident in Reno,[4] and the hospital's invitation to Dr. Capener had been designed to rectify that situation.

After Dr. Capener had declined the invitation to join with them, the entrenched physicians mounted a campaign of opposition to him, including an unsuccessful effort to deny him hospital privileges upon his arrival, a series of complaints to the Nevada Medical Board, and assistance in bringing several malpractice cases against him, all of which came to naught. However, by early to mid-2001, the entrenched physicians had begun

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[3] The phrase was that used by Dr. Bishop, another local medical practitioner, who so testified at trial (SER1106).

[4] Through various interlocking relationships, this group contained five physicians - Drs. Dooley, Ludlow, Mathis, West, and Zamboni - all of whom ultimately gave testimony against Dr. Capener, either at trial or in the government's post-trial opposition to the Hyde motion, or both. Dr. Dooley also acted for the government as a coordinator of expert testimony against Dr. Capener. *See* DD82, exhibits 1-11 (reprinted at SER64-84).

collaborating with a regional health insurance carrier, Great West, which eventually became the government's principal complaining witness,[5] to develop the allegation that Dr. Capener was performing "excessive" sinus surgeries.

The Investigation

Great West initially took its complaint to Nevada state officials, who sought to involve their federal counterparts, including the FBI and the U.S. Attorney for Nevada. An assistant Nevada state attorney general, Ms. Rhonda Clifton, was appointed as a Special Assistant United States Attorney, and thereafter became the lead prosecuting attorney for the federal government through trial, assisted by a regular AUSA, Mr. Ron Rachow.

In March 2002, the lead FBI agent, Ms. Anna Brewer, led a raid by federal and state agents on Dr. Capener's medical office in Elko, seizing large amounts of records and conducting the interview with Dr. Capener that was designed to set up the government's eventual "false statement" count. (*See* SER932). Thereafter, the investigation went underground, cloaked in Grand Jury secrecy, for the next three years.

Few details have emerged from this three-year interregnum, but what became clear from

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[5] Two employees of Great West testified against Dr. Capener at trial. Like nearly all of the government's witnesses, they had no firsthand knowledge of the underlying events. (*See* SER920-23).

subsequent revelations is that the government gave very little attention to investigating the facts, or, if it did so, it hid the evidence.[6] The government was engaging the services of various experts to developed theories ungrounded in the facts. Among these were a "coding" expert–a nurse claiming expertise in the Current Procedural Terminology or "CPT" codes used in medical billing systems- which was to form the basis for the government's indictment (*see* DD82, exhibit 12, reprinted at SER85-104); and its lead medical expert, Dr. Rice.[7]

Finally, in May 2005, an indictment was returned against Dr. Capener, but it was kept under seal until a superseding indictment was produced in July 2005–some 40 months after the raid on Dr.

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[6] As Great West was the health insurance carrier for many of the patients, the government had access to at least those patients' prior history through its primary complaining witnesses. We still do not know how much the government learned through this channel.

[7] Dr. Rice apparently had been referred to Ms. Clifton by regular AUSA Tanya Treadway, who had used Dr. Rice to convict a Dr. Daniels in the District of Kansas. (*See* ER88-89, which is Treadway's affidavit as submitted in the Hyde proceedings below). That Kansas prosecution provided the template for the prosecution against Dr. Capener. *See United States v. Daniels,* 188 F. Supp. 2d 1309 (D. Kan. 2002), 159 F. Supp. 2d 1285 (D. Kan. 2001); 95 F. Supp. 2d 1160 (D. Kan. 2000).

Capener's office–and the superseding indictment became the definitive charging document. (DD1 & 4).

The Indictment and Pretrial Proceedings

The superseding indictment contained 52 counts, of which 38 were laid under the health care fraud statute, 18 U.S.C. § 1347–one for each of 38 named patients of Dr. Capener–and 13 essentially redundant counts were laid under the mail fraud statute, 18 U.S.C. § 1341.[8] The remaining 52d count was a false statement charge under 18 U.S.C. § 1001.[9]

The indictment (DD4, reprinted at ER98-111) was prolix and self-contradictory. In most instances, multiple procedures for the 38 named patients were attacked, with the result that some 71 separate surgical procedures were placed at issue. As to each one of the 71 attacked procedures, the indictment made the inconsistent allegations that the surgical procedures were done unnecessarily, were not done at all, or were not done (or not "documented") adequately. In each instance, the attack was structured around the CPT code used in billing, and

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[8] These counts were redundant in that they embodied a subset of 13 of the 38 named patients covered by counts 1-38. These 13 apparently were selected because each one was insured by Great West, which had become the principal complainant.

[9] The original jurisdiction of the district court was invoked under 18 U.S.C. § 3231.

the allegations were hair-splitting (e.g, CPT 31288 was "fraudulently" billed rather than CPT 31287, where the only difference was whether tissue was removed from the sphenoid sinus).

From the outset, the defense objected to the use of the federal criminal fraud statutes to charge what at most was a civil case, and in particular to the use of 18 U.S.C. § 1347 to criminalize what amounted to a difference of professional opinion. On those grounds, as well as the prolixity and incoherence, in May 2006, the defendant moved to dismiss the indictment, and also to strike certain prejudicial allegations. (DD82 & 84). The motion to dismiss was denied, and the motion to strike only granted in part, but the district court ultimately did get the point. On last consideration of the dismissal motion in August 2006, the district court admonished the government that it would not be permitted to dress a civil malpractice case in criminal garb, and it also required the government to remove the most glaring inconsistencies of the indictment. Thereafter, the government split its fraud counts into two types: (1) the "necessity" counts, which did not contest whether the surgery took place, but rather argued that it was unnecessary; and (2) the "not done" counts, which purported to argue that the challenged surgery–or, more precisely, surgery justifying the given CPT code–did not take place.

It is important to bear in mind that the government's case was still splitting hairs. As to all of the 71 challenged surgeries, including the "not done" counts, there was never any question that a

surgical sinus procedure took place on the dates and times involved, in the hospital and on the patient in question, or that Dr. Capener was presenting and performing the surgery.[10] All of these surgeries were performed in hospital settings, with nurses and anesthetists present, and were amply documented in the hospital records. Rather, the government's case rested on fine distinctions as to exactly what sinuses had been involved (among the eight human sinuses), or exactly what Dr. Capener did while inside one or more of those sinuses. The government neither had nor presented any direct evidence on any of these matters; its case rested entirely on drawing highly attenuated inferences.

Like the "not done" counts, the government's "necessity" counts also unraveled when exposed to the light of day. The indictment had alleged that surgeries were "unnecessary" because "the patient could have been treated medically without surgery" (paragraph 10 of the indictment, DD4, p.7 (ER104)). Especially in light of this allegation, the defense was surprised to find very little documentation within the government's basic discovery indicating that the government had looked into the medical histories of the patients in question. Accordingly, the defense sought to use subpoenas to secure the production of

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[10] Aside from the Daniels prosecution in Kansas, the only comparble case of which we are aware is *United States v. Singh*, 390 F.3d 168 (2d Cir. 2004), but in that case, the allegation was that the physician was not even in the building at the time and place that the services were performed. That is a far cry from the type of allegations involved in this case.

the records of the patients' prior treating physicians, before being referred to Dr. Capener for surgical evaluation. Over the government's prolonged opposition,[11] eventually those subpoenas were obtained, and many thousands of pages of prior treatment records were reviewed. The records showed that the indictment's allegation was false, as these patients in fact had received prior treatment with medication, without success.[12]

The defense also moved successfully for a district court order directing that the parties exchange detailed expert witness statements under Criminal Rule 16, sufficient to show the basis of the prospective expert testimony under Evidence Rule 702. When the statements were exchanged, the defense moved to strike the government's statements as inadequate, thus providing another opportunity for the district court to end the prosecution. That motion also was denied.

However, and unknown to the defense at the time, the government's expert witness statements also contained the material omission of one of the principal theories intended to be presented through Dr. Rice, which came to be known in the court of appeals as the "bone fragments" theory.

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[11] Here again, the government followed the Daniels model from Kansas. DD60, at 3-4, reprinted at SER7-8.

[12] This analysis was performed by another defense expert, Dr. Carpenter. DD128, exhibit 4 (reprinted at SER163-219).

The Trial and Acquittal

The government's case against Dr. Capener went to trial by jury over 20 trial days, beginning on September 28 and ending on November 2, 2006, with a judgment of acquittal on all counts. A few of the counts (or sub-counts) were abandoned by the government at the beginning of trial, and two others were dismissed sua sponte by the district judge in the midst of trial, on the basis of the malpractice-like evidence that the government presented. After the close of the evidence, the district court dismissed all of the remaining "necessity" counts under Criminal Rule 29, upon defense motion. The remaining 25 counts–including 24 "not done" counts and the one false statement count–were submitted to the jury, which returned not guilty verdicts on all counts submitted.

On the first day of evidence at trial, October 2, 2006, the "bone fragments" theory was first exposed by the government through Dr. Rice's testimony. This theory was one of two supporting the "not done" counts, and consisted in the inferential argument that the absence of bone fragments in pathology specimens from certain surgeries supported the inference that the particular surgeries claimed had not taken place. This created two problems. First, as the theory had been omitted from the government's expert witness statements, the defense was surprised, and moved for leave to serve subpoenas for the pathology specimens and the pathologist's testimony, and in the alternative for dismissal. Second, as shown because the defense

was successful in obtaining access to the underlying facts, the "bone fragments" theory was false.

Although Dr. Rice had testified in terms of what the pathology specimens had contained, it turned that Dr. Rice had neither examined the specimens nor spoken with the examining pathologist, Dr. Mardini. As ultimately re-formulated in Dr. Rice's post-trial affidavit, he had drawn an inference from Dr. Mardini's written reports, that when the reports do not mention bone fragments, there are none in the specimen. Dr. Mardini himself was subpoenaed by the defense and testified that the mention of bone fragments follows no such pattern, as the purpose of the pathologists' examination is to look for disease in the removed tissues, and not to determine the presence or absence of bone fragments, which lack diagnostic significance.

Moreover, the defense also was successful in obtaining the pathology specimens themselves. Due to standard staining procedures used in preparing the pathology slides, the presence or absence of bone fragments is shown by distinctive coloration. Thus, everyone in the courtroom, including the judge and the jurors, could see the truth that all of the contested specimens contained bone fragments. Thus, the bone fragments theory was demolished.

However, the bone fragments episode was not unique. Both Dr. Rice and another expert, Dr. Bolick, testified to the inferential theory that, in those cases were specimens were not submitted for pathologists's examinations, it means that the

surgery was "not done." That theory also turned out to be false, as the defense established by calling the hospital personnel who actually handled such submissions in the hospital on the occasions in question. (SER1110-29).

Dr. Rice also added a further theory on the "not done" counts, which is that the time shown in the operative reports was insufficient to complete the surgeries in question.[13] The defense also proved that theory to be false, by showing a video, narrated by defense expert Dr. Kountakis, in which Dr. Capener does it. (SER1018-33).

On the parallel "necessity" counts, the government's theory, again presented through Dr. Rice, was that the findings on pre-operative Computerized Tomography scans were insufficient to justify the extent of surgery performed by Dr. Capener. This theory turned out to be nothing more than a difference in medical opinion. By his own admission, Dr. Rice favored a "minimalist" approach to sinus surgery, but it has been long known that CT findings do not correlate well with patients' symptoms and response to treatment. As simply put by the defense expert, Dr. Kountakis, "the goal of surgery is not to make an X-ray look better, but to help the patient feel better." (DFER4).

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[13] Once again, this argument had been borrowed from the Daniels prosecution in Kansas. Dr. Rice did not have any data at all to support this theory; he just made it up.

At the close of the evidence, the district court dismissed all of the government's remaining "necessity" counts as unfounded in both fact and law. They were unfounded in fact because the patients's prior medical records–those that had been obtained by defense subpoenas over the prosecution's objection–showed "in every case" that prior medical treatment had been tried unsuccessfully. (SER1228-36). They were unfounded in law because the differing approaches to surgery represented nothing more than a difference in medical opinion, which the enacting Congress had expressly excluded as a basis for criminalization under 18 U.S.C. § 1347.

The trial judge also had indicated his inclination to dismiss the "not done" counts, but changed his mind over a weekend break, and sent those counts to the jury. While we believe that this ruling was incorrect, we do not know what the court would have done with a guilty verdict, as the jury came back with not guilty verdicts on all remaining counts.[14] We do know that the same trial judge ultimately found that the government's presentation of the "bone fragments" theory, which related to the counts that were allowed to reach the jury, was frivolous.

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[14] Actually, the district judge virtually directed a verdict for the defense, by instructing the jury on the meaning of CPT codes (SER1236-37), thus resolving another silly point that the government had pressed, which was that part of the frontal sinus was not covered by the frontal sinus CPT code.

The Fee-Shifting Hyde Amendment Proceedings and Decisions Below

Upon the judgment of acquittal, the defendant moved for fees and expenses under the Hyde Amendment, and, in the alternative, for discovery in aid of his application, to the extent not granted. (DD228). After taking written submissions and oral argument, the district judge announced his intention to make a partial award of fees and expenses, measured by those incurred by the defense in refuting the "bone fragments" theory, and directed the parties to make submissions regarding the amount of fees.

In connection with its award of approximately $280,000 in fees and expenses to the defense, the district court rendered an opinion and order dated June 18, 2007 (a56-66), making findings and conclusions, based upon the parties' Hyde submissions, and upon the trial evidence and the other evidence of record. The court's principal finding is that the "bone fragments" theory was frivolous:

> "a showing of frivolousness may be made based on a finding that the prosecution had "reason to believe" its case had no support. See [United States v] *Braunstein*, 281 F.3d at 996. In this case, the Government had reason to believe that its fraud theory based on the absence of bone in the pathology slides lacked merit.

"Prior to trial, the Government interviewed Dr. Mardini, the pathologist who produced the reports. At trial, Dr. Mardini testified that contrary to the Government's assertion, bone fragments existed in all the pathology slides, and that he would have so told anyone who asked him before trial. The evidence confirmed that Capener's pathology slides contained bone fragments. This showing completely destroyed one of the Government's main arguments in support of its case. As noted above, the Government interviewed Dr. Mardini and discussed the case with him before trial. The Government contends it did not ask Dr. Mardini about the pathology reports. While Dr. Mardini provided a sworn affidavit wherein he stated that he did "not recall whether [he] was ever specifically asked about the presence of bone in the slides" (#243-2 at 2), he did confirm that his investigation conclusively demonstrated bone fragments in the pathology reports for Capener's surgeries. Either the Government consciously decided to proffer a theory it knew was false, or it failed to conduct any investigation or inquiry to confirm whether Dr. Rice's contentions regarding lack of bone fragments was in fact accurate. In addition, the Government failed to produce to Capener expert disclosures

> from Dr. Rice, which discussed the lack of bone as a basis for his opinions. Taken together, these facts indicate the Government had reason to believe their lack-of-bone theory was without support. The Government had the ability to overcome Dr. Rice's failure to investigate the basis for his opinion regarding the lack of bone in the pathology slides. In this regard, this case is on point with Braunstein. Accordingly, the Court finds that the Government pursued frivolous claims as to the fraud-related counts based on the Government's first pillar – the lack of bone in the pathology reports from surgery."

(61a-63a).

The government took an appeal from the partial award, and the defense cross-appealed for a full. Following briefing and argument, the court of appeals reversed the partial award, and rejected the cross-appeal, in an opinion issued on January 10, 2010 (1a-27a). The defendant made a timely petition for panel rehearing and rehearing en banc, primarily on the ground that the court of appeals' opinion had overlooked its own recent en banc decision in *United States v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009), which had recast the applicable standards of "abuse-of-discretion" and "clearly erroneous" review, avowedly to make those standards more deferential to the district court. Nevertheless, the panel adhered to its original

decision setting aside the district court's finding as "clearly erroneous," and therefore an abuse of discretion, and issued an amended opinion (29a-65a) that now included a citation to the *Hinkson* and made other minor wording changes at several points. With that amended opinion, the court of appeals issued an order (29a) dated June 9, 2010, denying both panel rehearing and rehearing en banc.

REASONS FOR ALLOWING THE WRIT

I. The Standards Applicable Under the Fee-Shifting Hyde Amendment Present Important Questions of Federal Law that Have Divided and Confused the Lower Courts, and Should Be Settled by this Court.

In the thirteen years since its enactment, the fee-shifting Hyde Amendment has not been considered or construed by this Court. Although the statute has been interpreted in a number of circuit and district court cases, the lower courts have not reached convergence, even on the fundamentals of what its key provisions of "vexatious, frivolous, or in bad faith" actually mean, or whether they are fully distinguishable from one another.

While this doctrinal dissonance alone would be sufficient to justify review in this Court, there appears to be an even more fundamental problem at work. Whatever their disagreements, the lower courts, and especially the courts of appeals, are grudging in their construction of the scope of the remedy provided by the fee-shifting Hyde Amendment. This appears to reflect an inappropriate transference into this field of prudential concerns more akin to those influencing constitutional criminal procedure, which are entirely out of place in construing what in fact is a very limited and mild statutory remedy supplied by Congress, and applicable only to federal prosecutions.

Therefore, we should begin with a clear understanding of what the fee-shifting Hyde

Amendment is, and is not. The statute is limited in its scope: it applies only to a subset of prevailing defendants in federal prosecutions. Unlike many protections of constitutional criminal procedure, it involves no problem of establishing a lowest-common-denominator standard to govern both federal and state authorities in a myriad of circumstances. It involves no remedy that suppresses probative evidence, or requires non-merits dismissals of potentially meritorious charges. It does not interfere in any way with the Grand Jury process, or with the Executive Branch's authority to investigate and charge as it will, or with the Judiciary's authority to adjudicate. It does not sanction any individual officer of the government. It is not punitive; its scope is entirely compensatory, and only partially so. The responsibility affixed is institutional only, and reflected only in an assessment to the prosecuting agency's appropriated funds. As such, it requires only that the costs of prosecutorial overreach be spread across all taxpayers, rather than being concentrated, to personally ruinous effect, in a single, unfortunate, middle-class defendant,[15] who by definition has prevailed against the government. Surely, the authority to enact such a provision is well within the broad appropriation powers of Congress, and should be construed in accordance with its fair intendment,

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[15] The statute itself excludes those defendants "represented by assigned counsel paid for by the public," and through its reference to 28 U.S.C. § 2412, also excludes individuals with a net worth above $ 2 million, *see* 28 U.S.C. § 2412(d)(2)(B).

as it does not encroach upon the powers of any other Branch.

The central intent of protecting such individuals against the potentially ruinous financial consequences of a successful defense was clearly expressed by the legislation's sponsor, Representative Henry Hyde:

> "If you were to take a piece of paper and sit down and say, what is the most unjust thing in all of the law, you would have to say when you are pursued by somebody, and you are ultimately indicated, and you have to swallow what can be bankrupting costs."

143 Cong. Rec. H7791 (September 24, 1997). Representative Hyde had initially proposed that his bill be modeled closely on its civil counterpart, the Equal Access to Justice Act (the "EAJA"), 28 U.S.C. § 2412, which provides for an award of fees to a prevailing party against the government unless the government proves that is position was "substantially justified," 28 U.S.C. § 2412(d)(1)(A). As a result of objections raised during the floor debates, and in the newspapers by the Department of Justice, the standard of not "substantially justified" was replaced by the "vexatious, frivolous, or in bad faith" standard, and the government was relieved of its burden of proof. However, the basic intendment of the statute, to provide a modicum of fairness and justice to the victimized defendant, was not affected.

In the ensuing years, the lower courts have struggled with the meanings of "vexatious, frivolous, or in bad faith," without producing any satisfactory consensus and without a recognition of the remedial intent of the statute to create a safety valve for the federal criminal justice system that provides better justice for the individual caught in its toils, without impeding the efficacy of enforcement and prosecution . Sooner or later, this Court will be impelled to take up a fee-shifting Hyde Amendment case by the obvious imbalance between its remedial purpose and its crabbed construction by the lower courts. The present case provides an appropriate vehicle for that task.

A. The Lower Courts' Decisions Are Divided and Confused.

As the statute does not contain any definitions of the key terms of "vexatious, frivolous, or in bath faith," the lower courts largely have referred to dictionary definitions of those terms. Unfortunately, the courts have not used the same definitions or the same dictionaries, and sometimes have used different ones within the same case.

The early leading case was *United States v. Gilbert*, 198 F.3d 1293 (11th Cir. 1999), which relied upon selected definitions from both the 6th and 7th editions of *Black's Law Dictionary* to propose that "vexatious" meant "without reasonable or probable cause or excuse," 198 F.3d at 1299 (using the 7th edition), while "frivolous" meant the same thing as "frivolous action," defined as "groundless . . . with little prospect of success; often brought to embarrass

or annoy the defendant, " *id.* at 1299 (using the 6th edition), and "bad faith" as "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity," *id.* (using the 6th edition). *Gilbert*'s definitions have been adopted in some of the Circuits, and rejected in others, often with very limited consideration.

The Ninth Circuit has rejected the *Gilbert* definition of "vexatious," substituting a two-part test containing both objective and subjective elements, *United States v. Sherburne*, 249 F.3d 1121, 1127 (9th Cir. 2001); *United States v. Manchester Farming Partnership*, 315 F.3d 1176, 1182 (9th Cir. 2003), and the First and Second Circuits follow the Ninth in this respect, *United States v. Knott*, 256 F.3d 29 (1st Cir. 2001); *United States v. Schneider*, 395 F.3d 78 (2d Cir. 2005). However, the Fourth, Sixth, and Eighth Circuits follow the *Gilbert* formulation precisely, *In re 1997 Grand Jury (Bunn)*, 215 F.3d 430 (4th Cir. 2000); *United States v. Heavrin*, 330 F.3d 723 (6th Cir. 2003); *United States v. Porchay*, 553 F.3d 704, 711 (8th Cir. 2008), as do district courts in the Tenth and D.C. Circuits, *United States v. Erwin*, 2010 WL 1816349 (E.D. Okla. 2010); *United States v. Wade*, 93 F. Supp. 2d 19 (D.D.C. 2006).

On the other hand, while the Ninth Circuit purports to follow the *Gilbert* definition of "frivolous," it actually evolved the definition in *United States v. Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002) into "obviously wrong," *id.*, as applied in that case to a failure to investigate adequately. In the present case, the district court found *Braunstein*

to be controlling (62a), but it was distinguished by the court of appeals, on the ground that the district court's finding did not identify an "affirmative reason to believe that its bone fragments theory was wrong" (44a-45a), thus apparently introducing some concept of passive versus active frivolousness.

A similar but more pronounced development occurred in the Sixth Circuit, *see Heavrin*, 330 F.3d at 723, the Eighth Circuit, *United States v. Beeks*, 266 F.3d 880, 883-84 (8th Cir. 2001); *United States v. Bowman*, 380 F.3d 387 (8th Cir. 2004), and in district courts in the Third and Tenth Circuits, ; *United States v. Milloy*, 75 F. Supp.2d 1276, 1277 (D.N.M. 1999)(using the actual *Black's* 7th edition definition of "frivolous" rather than "frivolous suit" (as in *Gilbert*) as "lacking a legal basis or legal merit; not serious; nor reasonably purposeful," while the First, Second, and Fourth Circuits have followed the *Gilbert* formulation more precisely. *See Bunn*, 215 F.3d at 437.

Two aspects of these developments have been particularly problematic. First, *Gilbert*'s formulation of "vexatious" as assimilating a concept of "probable cause" has produced much mischief, as "probable cause" is primarily a constitutional law or Grand Jury standard that was expressly rejected by the enacting Congress for use with the fee-shifting Hyde Amendment, *see* H.R. Rep. No. 105-405, 105th Cong. 1st Sess. at 194 (November 15, 1997)– a proposition that some courts have recognized, *see United States v. Manchester Farming Partnership*, 315 F.3d 1176, 1184 (9th Cir. 2003), and others have not, *see United States v. Isaiah*, 434 F.3d 513 (6th

Cir. 2006). A more recent and extreme development along these lines is the Eighth Circuit decision in *United States v. Porchay*, 553 F.3d 704 (8th Cir. 2008), which appears to hold that the existence of "probable cause" is a defense against both the "vexatious" and "frivolous" branches of the Hyde standard.[16]

Second, even in those Circuits, such as the Ninth, who have rejected the *Gilbert* standard, the substitute two-part test may be even worse. As "frivolous" generally is thought to be an objective test, and "bad faith" a subjective one, the combination of both objective and subjective elements would appear to render "vexatious" entirely redundant,[17] which cannot be a permissible interpretation.

This discussion could continue, more or less indefinitely. But enough has been shown to demonstrate the divisions and disarray in the lower courts. Given the developments to date, it does not seem likely that the lower courts will converge on any coherent construction of the statute, without further guidance from this Court. It need hardly be

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[16] In the present case, the government cited and relied upon *Porchay*.

[17] "[T]he two-part standard [for vexatiousness], without further refinement, seems at odds with the principle that statutes should not be read such that they render terms redundant," *United States v. Mitselmakher*, 2008 WL 5068609, at *11 (E.D.N.Y. 2008).

said that there are better sources of guidance than successive editions of *Black's Law Dictionary*, with its ever-changing definitions. For example, the best-known analog to "frivolous" is the one provided by Civil Rule 11, which establishes an objective standard of reasonable investigation; the best-known analog to "vexatious" is 28 U.S.C. § 1927, which is framed in terms of unreasonable "multiplication" of proceedings, even within a case otherwise having merit. It would anomalous indeed if federal criminal prosecutors were not held to a standard at least as rigorous as private civil lawyers.

Nor are we at sea, or limited to constitutional minima, in discovering the responsibilities in federal prosecutors for fairness and diligence respecting all concerned, including the defendant. We have a long tradition of that ethic, *see Berger v. United States*, 295 U.S. 78, 88 (1935), and contemporary standards in the form of the Department of Justice's own statements, such as the *United States Attorneys' Manual*, which set higher standards than the constitutional minima.

These questions certainly have sufficient importance to warrant this Court's attention. With record levels of incarceration in this country, and increasing public concern over the ever-expanding scope of federal criminal prosecution, this Court should consider a pre-existing statute that appears intended to restore and maintain public confidence in the fairness of the federal prosecution function.

B. The Court of Appeals' Endorsement of a "Reliance on Experts" Defense for the Government Creates a Dangerous Precedent.

In addition to the need for clarity and control of the standards for "vexatious, frivolous, or in bad faith," this case also presents an important question regarding the meaning of the statutory language referring to "position of the United States." This question can not wait for a division of authority to open up in the lower courts, because it creates an enormous loophole in the statute, and provides perverse incentives to federal prosecutors.

We are referring here to court of appeals' apparent endorsement of the government's argument that it could defend against a Hyde award by pleading "reliance" on its retained experts–in this case, Dr. Rice, who if not malicious was certainly incompetent--as an excusing condition for lack of duly diligent investigation (*see* 45a-48a). This holding, for which there is no applicable authority other than the decision below, sets a dangerous precedent that seems to authorize, and perhaps to encourage, the delegation of portions of the federal prosecution function outside the Executive Branch, and indeed outside the government entirely.

C. This Case Presents an Appropriate Vehicle for Review.

This case provides an appropriate vehicle for review on certiorari, for two principal reasons.

First, the case presents an array of issues preserved in a fully-developed record that includes a trial on the merits. In the district court, the Petitioner moved for fees under all three of the Hyde standards of vexatious, frivolous, and in bad faith, and also moved in the alternative for discovery in aid of the application. All of these points are preserved by the defendant's cross-appeal, and so remain live issues in the case.

Second, the substantive context of this case is an important one today, and will become still more important in the future, so as to warrant this Court's close attention. The principal charging statute against Dr. Capener was 18 U.S.C. § 1347, which is the capstone provision of federal health care law. With the recent expansion of federal involvement in the health care industry, this statute will become still more important in the future, and the potential for abusive prosecution will become far more harmful to the Nation's well-being. In the district court and on cross-appeal, the Petitioner argued that the government's use of 18 U.S.C. § 1347 in this context was improper, as it violated the Congressional intent that the statute *not* be used to criminalize differences in medical opinion as to the appropriate diagnosis and treatment of illness and disease. *See* H. R. Conf. Rep. No. 104-736, 104 Cong. 2d Sess. 258 (July 31, 1996). The court of appeals flatly held that there was "nothing improper about these aspects of the government's case" (25a;50a), because the government's presentation "to the effect that the surgeries were not actually necessary tended to show that Capener could not have subjectively believed they were necessary" (*id.*).

Note that this holding was rendered upon a record in which the district court had refused to allow the "necessity" counts to reach the jury, meaning that no reasonable or rational person could draw the inferences argued. Nevertheless, the court of appeals apparently held that any prosecutor anywhere could ask that such inferences be drawn, and would be doing "nothing improper."

If this ruling by the court of appeals is allowed to stand, then how is the Congressional purpose to be effectuated? Physicians already are concerned about second-guessing by health care bureaucracies and disgruntled patients. If federal prosecutors are added to the mix, and allowed to proceed solely on the idiosyncratic opinions of hired experts, with the unlimited resources of the federal government at their disposal, then the stakes will be raised beyond reason. Even if most defendants are fortunate enough, like Dr. Capener, to obtain a diligent judge and jury, and a vigorous defense, will they be willing to risk their personal liberty and expend millions in defense costs, without any hope of reimbursement if they are vindicated? If not, then who will practice medicine under such conditions? Particularly in a context as sensitive as this one, these questions are worthy of this Court's attention.

II. This Court Should Consider the Availability of Civil Discovery on Fee-Shifting Hyde Amendment Applications.

The court of appeals' decision below is one of the few to recognize the problem created by the need to construe the fee-shifting Hyde Amendment in pari

materia with the EAJA, especially as regards the availability of discovery in aid of a Hyde application. The Ninth Circuit previously has held that a district court has discretion to order to discovery on a Hyde motion, upon "good cause." *United States v. Lindberg*, 220 F.3d 1120 (9th Cir. 2000). While recognizing that authority, the court of appeals' ruled that the "exact scope" of that power "need not be decided here," because the district court was within its discretion (55a).

The more general problem is created by the cross-reference from the Hyde Amendment to the " the procedures and limitations" of the EAJA, as particularly construed in light of 28 U.S.C. § 2412(d)(1)(B), which provides that the "substantial justification" determination is to be made "on the basis of the record . . . which is made in the civil action." This may not cause a problem under the EAJA itself, as the government bears the burden in the civil case. But under the Hyde Amendment, where the burden is shifted and the standards more rigorous, it can create an insurmountable hardship to a prevailing criminal defendant. Civil cases simply are not the same as criminal cases. Furthermore, because Hyde Amendment proceedings themselves are civil matters, while the underlying case is criminal, it is not clear how the cross-reference is supposed to work.

As a result, there is a division of authority on the scope of discovery rights in support of Hyde amendment applications. *Compare United States v. Schneider*, 395 F.3d 78, 91 (2d Cir. 2005), *with United States v. Truesdale*, 211 F.3d 898 (10th Cir.

2000), *and United States v. Gardner*, 23 F. Supp. 2d 283 (W. D. Okla. 1998). The right to seek Hyde relief can easily become an empty gesture in the absence of some access to evidence held by the opposing party. To a very large extent, that is the problem in this case: the principal prosecutors ultimately chose to remain silent. That should not be an option after the prosecution is over, and the only question remaining is public accountability, which ultimately is the value secured by that statute.

III. The Ninth Circuit's Adoption of a New Standard for "Clearly Erroneous" Review Should Be Considered by this Court.

The petitions for rehearing and rehearing en banc below were impelled by two surprising developments in the original panel opinion. First, the court of appeals chose to rest its reversal on "clearly erroneous" review, which had not even been argued by the government. Second, having made that choice, the court of appeals' decision overlooked its own recent en banc decision in *United States v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009)(en banc), which totally recast the Ninth Circuit's approach to defining both "abuse of discretion" and "clearly erroneous" standards of review.

Moreover, *Hinkson* itself was based on the Ninth Circuit's perception that of this Court's precedents– *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948), and *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949)–were in tension with one another in their definitions of "clearly erroneous"

review. *See Hinkson*, 585 F.3d at 1260-61. However, while apparently starting out to expand the deference due to district court findings of fact, *Hinkson* ends by ruling that:

> "even when a court of appeals determines a trial court's findings are "permissible" (Yellow Cab Co.) or not a "mistake" (U.S. Gypsum Co.), the court of appeals must reverse if the district court's determination is "illogical or implausible" or lacks "support in inferences that may be drawn from facts in the record."

Id. at 1261. Although this formulation borrows language from the currently ruling case of *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), it seems inconsistent with *Anderson*'s holding, the essence of which is that courts of appeals may not choose between two permissible findings.

This implication is clearly demonstrated in this case by the application of *Hinkson* in the amended opinion issued upon the court of appeals's denial or rehearing (28a-55a), which seems even less deferential than the original. Apparently, confusion about the new test is not a unique reaction, because the Ninth Circuit itself is still dealing with *Hinkson*. In July, upon a further rehearing, Chief Kozinski changed his vote in that case. *See United States v. Hinkson*, 611 F.3d 1098 (9th Cir. July 14, 2010).

Even one Circuit's drift would be significant on a doctrine as important as clear error review,

which pervades may areas of law. However, as *Hinkson* and its application here also is in conflict with this Court's *Anderson* opinion, it provides an additional ground for granting certiorari.

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

/s/
JEFFREY S. PARKER

Counsel of Record
for Petitioner
Mark Capener

September 7, 2010

APPENDIX TO PETITION FOR CERTIORARI

1. Court of Appeals' Original Panel Opinion (January 8, 2010)

For Publication [590 F.3d *1058]
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Cross-Appellee,

v.

MARK CAPENER,
Defendant-Appellee-Cross-Appellant.

Nos. 07-10359, 07-10372
D.C. No. 3:05-CR-0114- RCJ-RAM

OPINION

Appeal from the United States District Court
for the District of Nevada
Robert C. Jones, District Judge, Presiding.

Argued and Submitted
November 17, 2008—San Francisco, California

Filed January 8, 2010.

Before Kim McLane Wardlaw and William C. Canby, Jr.,

Circuit Judges, and David G. Trager,* District Judge.

Opinion by Judge Trager

COUNSEL

Vijay Shanker, United States Department of Justice, Washington,
DC, for the plaintiff-appellant-cross-appellee.

Jeffery S. Parker, Great Falls, Virginia, for the defendant-appellee-cross-appellant.

[*1061]

OPINION

TRAGER, District Judge:

This case arises out of the failed prosecution of Dr. Mark Capener for health care fraud in violation of 18 U.S.C. § 1347, mail fraud in violation of 18 U.S.C. § 1341 and making false statements in violation of 18 U.S.C. § 1001. During the period relevant to this case, Dr. Capener was an otorhinolaryngologist in Nevada. The charges against him involved billing for surgeries that were allegedly either unnecessary, never performed or exaggerated for billing purposes

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* The Honorable David G. Trager, United States District Court Judge for the Eastern District of New York, sitting by designation.

("upcoded"). After an extended investigation and a lengthy trial, the district court dismissed many of the counts against Capener on the ground that they were insufficiently supported by the evidence and the jury acquitted Capener of the remaining counts.

Following the trial, Capener moved for an award of fees to cover his defense costs under the Hyde Amendment, 18 U.S.C. § 3006A note, which allows an award of fees to a defendant when the prosecution acted in a manner that was "vexatious, frivolous, or in bad faith...." *Id.* The district court partially granted Capener's motion, awarding fees to cover the costs of defending against certain counts associated with one of the theories advanced by the government on the ground that this theory was frivolous.

Both parties appeal the district court's decision. The government argues that the district court erred by granting fees after considering the government's case piecemeal-rather than viewing the case's alleged faults in the context of the case as a whole. The government also argues that, even viewed piecemeal, no part of government's prosecution meets the Hyde Amendment's standards for an award of fees. Capener cross-appeals, arguing that the district court should have granted fees on the entire case. Capener also argues that the district court should have granted him discovery regarding his Hyde Amendment claim. For the reasons stated below, the district court is reversed and Capener's application for fees is denied in its entirety.

BACKGROUND

(1)

Investigation and Pre-Trial Proceedings

The investigation into Capener's medical practice began after Great-West Insurance Company referred him to the Nevada Attorney General, who, in turn, referred him to federal authorities. Great-West had contacted the Attorney General's office after Great-West's investigation of Capener's insurance claims appeared to reveal a pattern of excessive procedures and suspicious claims. In the course of the investigation, the government consulted Dr. John Dooley. Dr. Dooley reviewed some patient records and computed tomography ("CT") scans and indicated to the government that he believed that Capener had billed for unnecessary and unperformed surgeries.[FN1] Dooley also suggested ***1062** that the government consult Dr. Dale Rice. Dr. Rice reviewed Capener's patient files, pathology reports and CT scans and concluded that many of the surgeries that Capener billed for were either unnecessary or were not performed.

> FN1. The record is not clear regarding how many patient files Dr. Dooley reviewed. There is also no indication that Dr. Dooley ever disagreed with the government's main expert, Dr. Dale Rice, regarding any of the cases in question.

Capener was indicted in July 2005. The grand jury charged him with 38 counts of health care fraud in violation of 18 U.S.C. § 1347, 13 counts of mail fraud

in violation of 18 U.S.C. § 1341 and one count of making false statements in violation of 18 U.S.C. § 1001. The indictment alleged that the challenged procedures had not been performed, were unnecessary or were upcoded to increase the billing rate.

During the investigative phase, Dr. Rice indicated to the government that part of his conclusions were supported by the fact that no bone fragments had been reported in pathology samples taken from some of Dr. Capener's patients. Pathology samples consist of tissue taken from a patient after surgery. These samples are examined by a pathologist who then prepares a report. The bulk of the pathology reports that Dr. Rice reviewed had been prepared by Dr. George Mardini. Of the set of reports that Dr. Rice reviewed, some did not explicitly note the presence of bone fragments in the pathology sample while others specifically mentioned bone fragments. Dr. Rice concluded that, where bone fragments were present in a pathology sample, Dr. Mardini explicitly listed them in his report. The absence of any indication of fragments in the report therefore seemed to Dr. Rice to indicate that there were no fragments in the sample.

Dr. Rice theorized that, because some of the surgeries that Capener claimed to have performed would require breaking bones, bone fragments should have been present in the pathology samples. Where it appeared that they were not present, Dr. Rice reasoned that the surgery must not have been performed. Dr. Rice never indicated to the prosecutors that he needed further information or

clarification regarding the presence or absence of bone fragments in these pathology reports.

Prior to trial, the government produced an expert witness disclosure concerning Dr. Rice's expected testimony. This disclosure described Dr. Rice's conclusion that Capener had billed for unnecessary and unperformed surgeries. It also indicated that Dr. Rice would base his testimony on CT scans and his own experience and judgment. However, the disclosure did not indicate that Dr. Rice would be basing any of his conclusions on the belief that bone fragments were absent from the pathology samples. That said, the prosecution had disclosed the fact that the absence of bone fragments was a central part of their theory in discussions with Capener's prior counsel at an earlier stage of the case.

In fact, most, if not all of the pathology samples in question did contain bone fragments. Dr. Mardini simply had not specifically mentioned this fact in some of the reports. Dr. Mardini and another doctor called by the defense, Dr. Steven Skoumal, explained at trial that bone fragments fall under the more general category of "sinosal mucosa." Dr. Skoumal testified that there was nothing wrong with the fact that Dr. Mardini had not specifically mentioned bone fragments in the pathology samples. The government interviewed Dr. Mardini during its investigation but did not discover that the pathology samples actually did contain bone fragments.[FN2]

> FN2. The record is not entirely clear on what questions the prosecution asked Dr. Mardini when it spoke with him. Dr. Mardini was

called by the defense at trial and was asked whether the prosecution specifically inquired about the presence of bone fragments in the samples. He stated that he could not recall.

*1063 Also, as part of the pretrial proceedings, Capener moved for a subpoena to examine the medical records of the patients mentioned in the indictment. The government opposed his initial motion for subpoenas on the grounds that the proposed subpoenas were procedurally defective under Fed. R.Crim.P. 17, overly broad and non-compliant with protections for patient privacy in the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

The district court quashed the subpoenas, generally agreeing with the reasons put forth by the government. Later, the defense came forward with a more narrowly drawn request for subpoenas in compliance with HIPPA. The government filed no objection to most of the new, more narrowly drawn subpoenas. A magistrate judge issued subpoenas pursuant to the defense's second request. The material produced in response to these subpoenas indicated that many of the patients Capener had operated on had a history of sinus problems, tending to show that they might have appeared to need surgery.

(2)

Trial

In its case-in-chief, the government called Dr. Rice.

Dr. Rice testified that, in his expert opinion, Capener had billed for unnecessary or unperformed surgeries. The major bases for his opinion were that (1) Capener's records indicated implausibly short times for the claimed surgeries, (2) some of the CT scans indicated that certain nasal bone structures were intact, which Dr. Rice felt would not have been intact if the claimed surgery had been performed, (3) CT scans indicated that some patients did not have frontal sinuses, as that term is medically defined, making it impossible for Capener to have performed frontal sinus surgery on them as he claimed and (4) under Dr. Rice's interpretation of the pathology reports, no bone fragments were found in some pathology samples. Of the seventeen health care fraud counts that would ultimately reach the jury, eleven did not rely at all on the bone fragments theory. With respect to the six counts where Dr. Rice did rely on the bone fragments theory, Dr. Rice also based his conclusion on one or more other theories as additional justifications.

The government called six significant doctors other than Dr. Rice to substantiate the charges against Capener. These other witnesses, however, collectively testified regarding far fewer patients than Dr. Rice. Drs. Bud West, David Mathis, Timothy Dyches, Anthony Zamboni and Michael Kaplan offered opinions regarding one patient each. In each case, they indicated that they did not believe that Capener had performed the claimed surgery. Dr. David Bolick testified that one patient's pathology sample lacked a type of tissue that it normally would have had if the claimed surgery had been performed and that he did not receive a

pathology sample for another patient even though he normally would have. All told, these doctors testified about a total of seven patients while Dr. Rice testified regarding at least seventeen patients. [FN3] In addition to these doctors, several of Capener's employees testified that they felt he used fraudulent billing practices. However, the government presented only one witness who had actually observed any surgeries and that witness claimed to have watched only a couple of them.

> FN3. The figure of seventeen patients includes only those whose surgeries related to counts that were actually sent to the jury rather than being dismissed by the district court.

In response to the government's contention that there were no bone fragments in some of the relevant pathology samples, the defense called Dr. Mardini, the pathologist*1064 who had processed the samples. Dr. Mardini testified that there had been bone fragments in most, if not all of the pathology samples he examined. Another defense pathologist, Dr. Skoumal, explained that bone fragments need not be separately listed on a pathology report as they can fall under the general category of sinonasal mucosa and Dr. Mardini had testified that, when he referred to sinonasal mucosa, he was including bone fragments. In addition, the defense presented pathology slides from patients treated by Capener. On these slides, the bone fragments were plainly visible.

The defense also addressed other elements of the government's case. In response to the contention

that some of Capener's surgeries had been unnecessary, the defense presented testimony indicating that aggressive surgical intervention of the sort espoused by Capener was an accepted treatment philosophy and that CT scans of the type relied on by Dr. Rice did not always indicate whether a patient suffered from sinus symptoms. Further, Capener put on testimony supporting his use of the relevant billing codes. The defense also presented a video showing Capener rapidly performing a surgery that the prosecution had indicated should take a long period of time.

In its rebuttal case, the prosecution again called Dr. Rice. Dr. Rice disputed the accuracy of the billing codes that Capener had used in charging insurance companies. Dr. Rice also suggested that the presence of bone fragments did not indicate that Capener had performed exactly the kind of surgeries he had claimed.

Following the close of the evidence, the defense moved to dismiss all the charges against Capener. The district court dismissed all twenty-one health care fraud and mail fraud counts alleging that Capener had performed unnecessary surgery, but sent to the jury the remaining twenty-five counts which alleged health care and mail fraud for unperformed surgeries and perhaps upcoding-although the record is not entirely clear on this point-and false statement. After a single day's deliberation, the jury acquitted Capener on all remaining counts.

Post-Trial Proceedings

Following the verdict, Capener moved for an award of fees under the Hyde Amendment. He argued that the prosecution's entire case was vexatious, frivolous and in bad faith. The government responded that its conduct did not entitle Capener to fees. In particular, the government argued (1) that its bone fragments theory was based on an understandable mistake given that Dr. Mardini had sometimes separately listed the presence of bone fragments, suggesting that when he did not do so, bone fragments were not present, and (2) that the bone fragments theory was only one of the government's arguments at trial.

The district court held a hearing on the fee motion at which the judge made several pertinent remarks. For one, the district court denied Capener's request for documents from the prosecution, finding that Capener had not raised sufficient suspicion to justify an order to produce documents. Regarding the fee request, the district court stated at the start of the hearing that:

> So far, subject to your arguments, I'm not convinced that the government moves in bad faith.... [F]rom the Court's own review of the proceedings, there was every reason to have suspicion and, of course, ultimately to obtain a finding of probable cause that criminal conduct had been engaged in.... So you've got an uphill battle....

***1065** The court later said that "it certainly is very possible that if this had been a civil lawsuit to

recover fraud ... that the government ... could well have prevailed...." The court also stated that it could not "fault the government for bringing this case." Further, the district court stated, "I am going to award-I'm considering awarding maybe a quarter of the attorneys fees.... [T]hat initial view is based on some very brief statements in the briefs here. It will have to be based on a more careful review of the affidavits with regard to the extent of the injury to the defendant...." At the close of the hearing, the district court indicated that "I'm not presently, as I sit here, inclined to exceed, roughly, a quarter, or a third of the overall fees. So I'll do that with review and we'll award something accordingly, for the reasons I've stated here."

After the hearing, the district court produced a written order making findings of fact and law. The district court found that Capener was entitled to partial relief under the Hyde Amendment. Specifically, the district court held that "the Government pursued frivolous claims as to the fraud-related counts based on the Government's first [theory]-the lack of bone in the pathology reports...." The district court reasoned that the "Government [either] consciously decided to proffer a theory it knew was false, or it failed to conduct any investigation ... to confirm whether Dr. Rice's contentions regarding lack of bone fragments was ... accurate." The district court also noted that the government had not indicated that Dr. Rice would testify regarding the bone fragments theory in its expert disclosure. Nonetheless, the district court found that the government had not acted in bad faith, noting that there was no evidence that Dr.

Rice lied on the stand and that there was not sufficient evidence that the government consciously acted with ill will.

Additionally, the district court found that the government had not acted vexatiously with regard to its opposition to Capener's subpoenas for the medical records of his surgical patients or in its decision to follow leads provided by allegedly disgruntled informants. The district court concluded that there was no ill will in either case and that some of the counts had been worthy of being submitted to a jury. Finally, the district court found that Capener's counsel "has not demonstrated that the Court should depart from" the standard $125/hour rate. Accordingly, the district court granted Capener's counsel $279,015.50 in fees and costs.

STANDARD OF REVIEW

"An award of attorney fees pursuant to the Hyde Amendment is reviewed for an abuse of discretion." *United States v. Sherburne*, 506 F.3d 1187, 1189 (9th Cir.2007). Discovery orders under the Hyde Amendment are reviewed for abuse of discretion. *United States v. Lindberg*, 220 F.3d 1120, 1126 (9th Cir.2000). "A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 936 (9th Cir.1994). "Reversal is warranted only if we find with a firm conviction that the district court committed a clear error of judgment." *United States v. Manchester Farming P'ship*, 315 F.3d 1176, 1181 (9th Cir.2003).

DISCUSSION

(1)

The Government's Appeal

On appeal, the government argues that the district court erred by considering the alleged flaws in the prosecution's case piecemeal rather than asking whether the case-viewed as a whole-met the Hyde ***1066** Amendment's standards for an award of fees. Capener responds that the district court did view the alleged shortcomings of the prosecution in the context of the case as a whole and that, even if it had not, it would not have been error to focus only on the allegedly flawed portions of the government's case. In fact, the district court conducted a piecemeal analysis of the government's case. Whether this approach was proper or not is something we need not decide because even if a piecemeal approach is permissible, the district court's conclusion that a portion of the government's case was frivolous was clearly erroneous.

The Hyde Amendment provides that:

> [T]he court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) ... may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that *the position of the United States was vexatious, frivolous, or in bad faith,* unless the court finds that special

> circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided ... under section 2412 of title 28, United States Code.

18 U.S.C. § 3006A note (emphasis added).[FN4]

> FN4. This case requires consideration only of the threshold question of whether a claimant receives any fees at all. Although it is unnecessary to decide the issue, it is worth noting that the amount of fees awarded may be subject to different considerations from those discussed here. *Cf. Comm'r, Immigration and Naturalization Serv. v. Jean*, 496 U.S. 154, 160-61, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990) (discussing the Equal Access to Justice Act "EAJA"); *United States v. Heavrin*, 330 F.3d 723, 730 (6th Cir.2003) (noting that EAJA cases are informative in interpreting the Hyde Amendment).

Thus, under the Hyde Amendment, a victorious defendant may be able to recover legal fees upon showing that the position of the United States was either vexatious, frivolous or in bad faith. 18 U.S.C. § 3006A note. However, "the burden is on the defendant in the underlying case." *Manchester Farming*, 315 F.3d at 1182. On the other hand, "[t]he elements are disjunctive; thus, the defendant need only prove one of the three elements to recover." *Id.* Regardless of the element a prevailing defendant advances, "the Hyde Amendment [is] targeted at prosecutorial misconduct, not prosecutorial

mistake." *United States v. Braunstein*, 281 F.3d 982, 995 (9th Cir.2002) (quoting *United States v. Gilbert*, 198 F.3d 1293, 1304 (11th Cir.1999)). Indeed, "mere 'faulty judgment' is not vexatious, frivolous, or in bad faith." *United States v. Tucor Intern., Inc.*, 238 F.3d 1171, 1180 (9th Cir.2001).

As noted above, although the district court did not find that the government had acted vexatiously or in bad faith, it did find that the bone fragments theory was frivolous. Frivolousness is defined objectively. A " 'frivolous' case is one that is groundless.... [A] case is frivolous when the government's position was foreclosed by binding precedent or so obviously wrong as to be frivolous." *Manchester Farming*, 315 F.3d at 1183 (internal quotation marks omitted). In support of the district court's frivolousness finding, Capener primarily contends that the prosecutors should have done a more thorough investigation and uncovered the fact that the pathology samples actually did contain bone fragments. As it happened, the government did interview the pathologist, Dr. Mardini, but did not discover that the samples contained bone fragments. This was a regrettable mistake-a clear failure by the prosecution to do its homework. The district court's finding that it was misconduct***1067** of the sort that could justify a fee award, however, goes too far.

It is true that, under limited circumstances, a failure by the government to thoroughly investigate a case can constitute frivolousness. *See Braunstein*, 281 F.3d at 996-97. However, a failure to sufficiently investigate generally can rise to the level of frivolousness only when the government had some

affirmative reason to know that further investigation was needed. For example, the *Braunstein* court found that the prosecutors acted frivolously when they had substantial information affirmatively calling their theory into question and pointing the way to further evidence but failed to investigate further. *Id.* In our case, by contrast, there is no evidence that the government had any affirmative reason to believe that its bone fragments theory was wrong.

Indeed, the government argues that it relied on Dr. Rice's expert opinion and therefore did not act frivolously with respect to the bone fragments theory. Because Dr. Rice never indicated any need for further investigation, the government contends, their failure to confirm that the pathology samples did not contain bone fragments does not justify a finding of frivolousness.

Where the government ceases investigation in reliance on the opinion of an expert and that expert has not indicated a need for any further investigation, the government generally has not acted frivolously. Cases from several areas of law indicate that this kind of reliance usually does not fall below minimum professional standards. *See, e.g., Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir.1995) (considering a claim of ineffective assistance of counsel); *Dubois v. U.S. Dep't of Agriculture*, 270 F.3d 77, 83 (1st Cir.2001) (considering a denial of sanctions). Though there do not appear to be any Hyde Amendment cases on point, the cases cited above still suggest that such reliance is generally not "obviously wrong," as

required for a finding of frivolousness. To be sure, *Hendricks* and *Dubois* do not apply particularly demanding tests of attorney competence. They are, however, still relevant to the case at hand. The Hyde Amendment does not require excellence-it targets "prosecutorial misconduct, not prosecutorial mistake." *Braunstein,* 281 F.3d at 995. "[M]ere 'faulty judgment' is not vexatious, frivolous, or in bad faith." *Tucor,* 238 F.3d at 1180. Reliance on an expert may well be faulty judgment in a given instance, but it generally will not constitute misconduct of the sort sanctioned by the Hyde Amendment, absent some affirmative reason for the government to know such reliance is misplaced.

Capener responds first that, as a factual matter, the government was not actually relying on Dr. Rice's expertise but had instead misled him-intentionally or otherwise-as to the contents of the pathology samples. Second, Capener contends that, even if the government had relied on Dr. Rice, that reliance would not automatically prevent liability under the Hyde Amendment. As to his first contention, Capener argues that Dr. Rice depended on the prosecutors for information to such a degree that he was relying on them rather than the other way around. This issue centers on what the prosecutors told Dr. Rice regarding Dr. Mardini's pathology reports. Dr. Rice's affidavit indicates that the prosecutors told him that Dr. Mardini had "verified the content of his reports."

This hardly diminishes the prosecutors' reliance on Dr. Rice's expertise. The fact that the prosecutors told Dr. Rice that Dr. Mardini "verified" his reports

could mean one of two things: either that the prosecutor told Dr. Rice that the reports were truthful or that the prosecutors told Dr. ***1068** Rice how to interpret the reports. In order for Rice to have made his error in reliance on the prosecutors, they would had to have told him how to interpret the reports. Dr. Rice's error was one of interpretation-deciding that the fact that a pathology report did not specifically mention bone fragments meant that no bone fragments were actually present. There is no reason to think that the prosecutors told Dr. Rice how to interpret the pathology reports or that he would have listened to them even if they had. The interpretation of a pathology report is a technical matter not a legal one. Accordingly, there is no basis for claiming that the prosecutors were not acting in reliance on Dr. Rice when they halted their investigation of the bone fragments theory.

Moreover, even if there are circumstances under which a prosecutor's reliance on an expert would not shield the government from liability under the Hyde Amendment, this case does not present such a situation. There is nothing else about the facts surrounding the prosecutors' reliance on Dr. Rice that suggests that this reliance was frivolous. Dr. Rice was an expert in his field and did not indicate that he needed any additional information regarding the absence of bone fragments in the pathology samples. Though the government apparently failed to ask the pathologist, Dr. Mardini, about the bone fragments issue, there was no specific indication that it was necessary to do so. Moreover, some of Dr. Mardini's pathology reports specifically indicated the presence of bone fragments, making it reasonable to

infer, as Dr. Rice and the government apparently did, that where a report did not specifically indicate bone fragments, that sample did not contain bone fragments.[FN5]

> FN5. Moreover, during the trial, the prosecution spoke with a pathologist named Dr. Samuel Parks. Dr. Parks indicated that, if some reports specifically mention the presence of bone fragments, it would be normal to assume that reports that do not specifically mention bone fragments indicate that the samples do not contain bone fragments. Dr. Parks also indicated that a report should specifically mention bone fragments when it contains bone fragments. Dr. Parks concluded that it was proper to interpret the reports written by Dr. Mardini that did not specifically mention bone fragments as reflecting the fact that the samples did not contain bone fragments. This buttresses the conclusion that the prosecution did not err in a manner that should subject them to liability under the Hyde Amendment.

The strongest point for Capener on the issue of whether the prosecutors were frivolous with respect to the bone fragments theory is the fact that the district court's finding on this point is entitled to deference. The district court wrote that:

> [E]ither the Government consciously decided to proffer a theory it knew was false, or it failed to conduct any investigation or inquiry to confirm whether Dr. Rice's contentions regarding lack of

> bone fragments was in fact accurate. In addition, the government failed to produce to Capener expert disclosures from Dr. Rice, who discussed the lack of bone as a basis for his opinion. Taken together, these facts indicate the Government had reason to believe their lack-of-bone theory was without support.

This finding, however, is clearly erroneous. The record simply does not substantiate the assertion that the government knew or had reason to believe that its lack of bone fragments theory was false. The district court cites only one fact in support of this view-that the government's pre-trial expert witness disclosure did not specifically indicate that Dr. Rice would base some of his testimony on the absence of bone fragments in the pathology sample.

***1069** The government, however, told Capener's prior attorney about this basis for Dr. Rice's opinions at an earlier stage of the case. Though the failure to include this information in the expert witness disclosure is regrettable, the fact that defendant's prior counsel was informed of the relevant information in another way indicates that there was no intent to deceive and no reckless disregard for the truth. Because the failure to disclose was not done with a culpable mental state, it cannot be evidence of willful blindness on the part of the prosecutors.

Finally, there is no basis in the record for the district court's statement that the government might have advanced a false theory. Indeed, this contention is contradicted by the district court's later finding that the government did not "conspire[with Dr. Rice] to

knowingly present false testimony." Accordingly, the district court's finding that the government's conduct regarding the bone fragments theory was frivolous is unsustainable.

(2)

Capener's Cross-Appeal

Turning to Capener's argument that he should have been awarded fees for the entire case, Capener raises several challenges to the government's conduct. First, he claims that the structure of the government's case was inappropriate. He argues that the prosecutors should not have tried to criminalize a difference in medical opinion regarding what treatments were necessary or structured a prosecution around highly technical medical billing codes. In fact, there was nothing improper about these aspects of the government's case. Capener was not being charged with treating patients on the basis of erroneous medical views-he was being charged with fraud for allegedly performing surgeries that he did not genuinely believe were necessary. The evidence presented by the prosecution to the effect that the surgeries were not actually necessary tended to show that Capener could not have subjectively believed they were necessary given his medical training and experience. Similarly, the government's arguments regarding Capener's use of billing codes were proper. Regardless of how complex the codes are, if Capener willfully upcoded procedures, that could constitute fraud.

Second, Capener argues that the prosecution's

conduct during the investigation was actionable under Hyde Amendment. His central argument is that the government must have been attempting to suppress or at least avoid the truth.[FN6] Capener faults the government for opposing his initial attempt to obtain subpoenas for the medical records of his patients. Capener sought these subpoenas in order to demonstrate that the patients had a history of sinus problems and therefore may have looked like they needed treatment. The district court, however, correctly found that there was nothing wrong with the government's initial opposition. Capener's initial subpoenas were invalid because, among other things, they did not comply with the privacy protections in HIPAA. There cannot be anything improper with opposing a legally invalid subpoena. Moreover, the government did not oppose the bulk of Capener's second round of ***1070** subpoenas, which were HIPAA compliant, indicating that the prosecution merely wanted subpoenas that were legally valid.

> FN6. Capener also alleges that this case arose against a background of malicious complaints by individuals who were biased against him-such as doctors who were business competitors of his-and that the government relied partly on disgruntled employees of Capener's as witnesses. Of course, the government must often rely on individuals who may have some agenda. This cannot give rise to Hyde Amendment liability here, however, given that the government recruited witnesses with no personal bias against Capener, such as Dr. Rice.

Also regarding the government's conduct during the investigative phase of the case, Capener insists that the prosecution must have known that his patients had a history of sinus problems and thus that surgery might have appeared necessary. Capener bases this contention on the fact that the case was referred to the government by an insurance company. He presumes that the insurance company had the relevant medical records and that the insurance company would have communicated the relevant facts about the patients' sinus problems to the prosecutors in making the referral. Capener argues that, if the prosecutors had known of these sinus problems, it could suggest that they were attempting to avoid the truth. The presence of prior sinus symptoms could at least arguably tend to show that Capener might have believed that the patients in question needed surgery because they had a history of sinus problems.

However, there is no real evidence that the prosecutors knew that some of Capener's patients had prior sinus problems. Nor is it necessarily true that the fact that the case was referred by an insurance company indicates that the prosecutors would have known of the sinus problems. The insurance company may not have informed the prosecutors of the patients' full medical histories or may not have had all the information itself. Capener argues that, even if the prosecutors did not know of these prior sinus problems, they should have sought the relevant medical records and uncovered this fact for themselves. In an ideal world, perhaps, the prosecutors would have tracked down these records.

However, their failure to do so was, at worst, negligence. Mere negligence cannot form the basis of an award under the Hyde Amendment. *Braunstein*, 281 F.3d at 995; *see also In re 1997 Grand Jury*, 215 F.3d 430, 436 (4th Cir.2000).

Capener also argues that the prosecution acted in bad faith, specifically with regard to Dr. Rice's testimony. As noted above, the district court specifically found that the prosecution did not intentionally proffer false testimony from Dr. Rice. Capener presents no substantial evidence to the contrary. Indeed, there is no basis for claiming that Dr. Rice's testimony was willfully false, rather than erroneous. Capener claims that Dr. Rice implied he had personal knowledge of facts that he actually had gleaned from reports created by other doctors. Whether Dr. Rice implied personal knowledge at trial is debatable, but even if he did, it hardly shows intentional or willful misconduct. Capener also stresses that the prosecution knew Dr. Rice would testify without having actually seen the pathology slides and argues that this shows an element of willful blindness. This is, however, a highly technical area. To rely on medical reports rather than the slides is hardly unreasonable. For the reasons stated above, there was nothing egregious about relying on Dr. Rice.

Thus, having found that the government's advancement of the bone fragment theory was not frivolous, we see nothing further in the prosecution's case to suggest that liability was appropriate under the Hyde Amendment. Accordingly, no fee award should have been granted in this case.

(3)

Capener's Discovery Motion

Capener further contends that the district court erred by refusing to grant him discovery in support of his motion for fees. Were this the case, a remand might be necessary so that the results of any ***1071** such discovery would be available in deciding whether to award fees. However, the district court did not err in refusing to grant discovery on Capener's Hyde Amendment claim.

The Hyde Amendment's tools for developing evidence are extremely limited. As noted above, the Hyde Amendment's procedures are based on the EAJA, which provides that a party's entitlement to fees shall be "determined on the basis of the record ... which is made in the civil action for which fees and other expenses are sought." 28 U.S.C. § 2412(d)(1)(B). The Eleventh Circuit has remarked that "Congress added this language to ensure that the substantial justification determination will not involve additional evidentiary proceedings or additional discovery of agency files, solely for EAJA purposes." *United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway,* 838 F.2d 1558, 1564-65 (11th Cir.1988) (internal quotation marks omitted).

The Hyde Amendment itself provides little additional scope for investigating the government's conduct. One portion of the Hyde Amendment indicates that "the court, for good cause shown, may

receive evidence ex parte and in camera...." 18 U.S.C. § 3006A note. Though this provision does not provide for traditional discovery in so many words, we have previously suggested that it might make some form of evidentiary development possible on a showing of good cause. *United States v. Lindberg*, 220 F.3d 1120, 1126 (9th Cir.2000).

The exact scope of this provision need not be decided here. The district court found that Capener had failed to show good cause for requiring the government to produce evidence. That finding was not an abuse of discretion. As the district court noted, Capener sought documents primarily to substantiate his claims that the prosecution acted in bad faith-but he failed to present any evidence to the district court supporting his allegations of bad faith on the part of the prosecutors. Under these circumstances, it was not an abuse of discretion to deny discovery.

CONCLUSION

For the reasons stated above, the district court's judgment awarding partial fees is reversed, and Capener's cross-appeal seeking full fees is rejected.

No. 07-10359 (main appeal) REVERSED.

No. 07-10372 (cross-appeal) AFFIRMED.

2. Court of Appeals' Amended Panel Opinion and Order Denying Rehearing (June 9, 2010)

For Publication [608 F.3d *392]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Cross-Appellee,

MARK CAPENER,
Defendant-Appellee-Cross-Appellant.

Nos. 07-10359, 07-10372
D.C. No. 3:05-CR-0114-RCJ-RAM
A ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
Robert C. Jones, District Judge, Presiding.

Argued and Submitted
November 17, 2008—San Francisco, California

Filed January 8, 2010.
Amended June 9, 2010.

Before Kim McLane Wardlaw and William C. Canby, Jr.,
Circuit Judges, and David G. Trager,* District Judge.

Opinion by Judge Trager

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* The Honorable David G. Trager, United States District Court Judge for the Eastern District of New York, sitting by designation.

COUNSEL

Vijay Shanker, United States Department of Justice, Washington,
DC, for the plaintiff-appellant-cross-appellee.

Jeffery S. Parker, Great Falls, Virginia, for the defendant-appellee-cross-appellant.

[*395]

ORDER

The opinion filed in this case on January 8, 2010, and reported at 590 F.3d 1058, is hereby amended. An amended opinion is filed concurrently with this order. With these amendments, the panel has unanimously voted to deny the petition for rehearing. Judge Wardlaw has voted to deny the petition for rehearing en banc, and Judges Canby and Trager so recommend. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED. No subsequent petitions for rehearing and rehearing en banc may be filed.

OPINION

TRAGER, District Judge:

This case arises out of the failed prosecution of Dr. Mark Capener for health care fraud in violation of 18 U.S.C. § 1347, mail fraud in violation of 18 U.S.C. § 1341 and making false statements in violation of 18 U.S.C. § 1001. During the period relevant to this case, Dr. Capener was an otorhinolaryngologist in Nevada. The charges against him involved billing for surgeries that were allegedly either unnecessary, never performed or exaggerated for billing purposes ("upcoded"). After an extended investigation and a lengthy trial, the district court dismissed many of the counts against Capener on the ground that they were insufficiently supported by the evidence and the jury acquitted Capener of the remaining counts.

Following the trial, Capener moved for an award of fees to cover his defense costs under the Hyde Amendment, 18 U.S.C. § 3006A note, which allows an award of fees to a defendant when the prosecution acted in a manner that was "vexatious, frivolous, or in bad faith...." *Id.* The district court partially granted Capener's motion, awarding fees to cover the costs of defending against certain counts associated with one of the theories advanced by the government on the ground that this theory was frivolous.

Both parties appeal the district court's decision. The government argues that the district court erred by granting fees after considering the government's case piecemeal-rather than viewing the case's alleged faults in the context of the case as a whole. The government also argues that, even viewed

piecemeal, no part of government's prosecution meets the Hyde Amendment's standards for an award of fees. Capener cross-appeals, arguing that the district court should have granted fees on the entire case. Capener also argues that the district court should have granted him discovery regarding his Hyde Amendment claim. For the reasons stated below, the district court is reversed and Capener's application for fees is denied in its entirety.

BACKGROUND

(1)

Investigation and Pre-Trial Proceedings

The investigation into Capener's medical practice began after Great-West Insurance*396 Company referred him to the Nevada Attorney General, who, in turn, referred him to federal authorities. Great-West had contacted the Attorney General's office after Great-West's investigation of Capener's insurance claims appeared to reveal a pattern of excessive procedures and suspicious claims. In the course of the investigation, the government consulted Dr. John Dooley. Dr. Dooley reviewed some patient records and computed tomography ("CT") scans and indicated to the government that he believed that Capener had billed for unnecessary and unperformed surgeries. [FN1] Dooley also suggested that the government consult Dr. Dale Rice. Dr. Rice reviewed Capener's patient files, pathology reports and CT scans and concluded that many of the surgeries that Capener billed for were either unnecessary or were not performed.

FN1. The record is not clear regarding how many patient files Dr. Dooley reviewed. There is also no indication that Dr. Dooley ever disagreed with the government's main expert, Dr. Dale Rice, regarding any of the cases in question.

Capener was indicted in July 2005. The grand jury charged him with 38 counts of health care fraud in violation of 18 U.S.C. § 1347, 13 counts of mail fraud in violation of 18 U.S.C. § 1341 and one count of making false statements in violation of 18 U.S.C. § 1001. The indictment alleged that the challenged procedures had not been performed, were unnecessary or were upcoded to increase the billing rate.

During the investigative phase, Dr. Rice indicated to the government that part of his conclusions were supported by the fact that no bone fragments had been reported in pathology samples taken from some of Dr. Capener's patients. Pathology samples consist of tissue taken from a patient after surgery. These samples are examined by a pathologist who then prepares a report. The bulk of the pathology reports that Dr. Rice reviewed had been prepared by Dr. George Mardini. Of the set of reports that Dr. Rice reviewed, some did not explicitly note the presence of bone fragments in the pathology sample while others specifically mentioned bone fragments. Dr. Rice concluded that, where bone fragments were present in a pathology sample, Dr. Mardini explicitly listed them in his report. The absence of any indication of fragments in the report therefore seemed to Dr. Rice

to indicate that there were no fragments in the sample.

Dr. Rice theorized that, because some of the surgeries that Capener claimed to have performed would require breaking bones, bone fragments should have been present in the pathology samples. Where it appeared that they were not present, Dr. Rice reasoned that the surgery must not have been performed. Dr. Rice never indicated to the prosecutors that he needed further information or clarification regarding the presence or absence of bone fragments in these pathology reports.

Prior to trial, the government produced an expert witness disclosure concerning Dr. Rice's expected testimony. This disclosure described Dr. Rice's conclusion that Capener had billed for unnecessary and unperformed surgeries. It also indicated that Dr. Rice would base his testimony on CT scans and his own experience and judgment. However, the disclosure did not indicate that Dr. Rice would be basing any of his conclusions on the belief that bone fragments were absent from the pathology samples. That said, the prosecution had disclosed the fact that the absence of bone fragments was a central part of their theory in discussions with Capener's prior counsel at an earlier stage of the case.

***397** In fact, most, if not all of the pathology samples in question did contain bone fragments. Dr. Mardini simply had not specifically mentioned this fact in some of the reports. Dr. Mardini and another doctor called by the defense, Dr. Steven Skoumal, explained at trial that bone fragments fall under the more

general category of "sinosal mucosa." Dr. Skoumal testified that there was nothing wrong with the fact that Dr. Mardini had not specifically mentioned bone fragments in the pathology samples. The government interviewed Dr. Mardini during its investigation but did not discover that the pathology samples actually did contain bone fragments.[FN2]

> FN2. The record is not entirely clear on what questions the prosecution asked Dr. Mardini when it spoke with him. Dr. Mardini was called by the defense at trial and was asked whether the prosecution specifically inquired about the presence of bone fragments in the samples. He stated that he could not recall.

Also, as part of the pretrial proceedings, Capener moved for a subpoena to examine the medical records of the patients mentioned in the indictment. The government opposed his initial motion for subpoenas on the grounds that the proposed subpoenas were procedurally defective under Fed. R.Crim.P. 17, overly broad and non-compliant with protections for patient privacy in the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

The district court quashed the subpoenas, generally agreeing with the reasons put forth by the government. Later, the defense came forward with a more narrowly drawn request for subpoenas in compliance with HIPPA. The government filed no objection to most of the new, more narrowly drawn subpoenas. A magistrate judge issued subpoenas pursuant to the defense's second request. The

material produced in response to these subpoenas indicated that many of the patients Capener had operated on had a history of sinus problems, tending to show that they might have appeared to need surgery.

(2)

Trial

In its case-in-chief, the government called Dr. Rice. Dr. Rice testified that, in his expert opinion, Capener had billed for unnecessary or unperformed surgeries. The major bases for his opinion were that (1) Capener's records indicated implausibly short times for the claimed surgeries, (2) some of the CT scans indicated that certain nasal bone structures were intact, which Dr. Rice felt would not have been intact if the claimed surgery had been performed, (3) CT scans indicated that some patients did not have frontal sinuses, as that term is medically defined, making it impossible for Capener to have performed frontal sinus surgery on them as he claimed and (4) under Dr. Rice's interpretation of the pathology reports, no bone fragments were found in some pathology samples. Of the seventeen health care fraud counts that would ultimately reach the jury, eleven did not rely at all on the bone fragments theory. With respect to the six counts where Dr. Rice did rely on the bone fragments theory, Dr. Rice also based his conclusion on one or more other theories as additional justifications.

The government called six significant doctors other than Dr. Rice to substantiate the charges against

Capener. These other witnesses, however, collectively testified regarding far fewer patients than Dr. Rice. Drs. Bud West, David Mathis, Timothy Dyches, Anthony Zamboni and Michael Kaplan offered opinions regarding one patient each. In each case, they indicated that they did not believe that Capener had performed the claimed surgery. Dr. *398 David Bolick testified that one patient's pathology sample lacked a type of tissue that it normally would have had if the claimed surgery had been performed and that he did not receive a pathology sample for another patient even though he normally would have. All told, these doctors testified about a total of seven patients while Dr. Rice testified regarding at least seventeen patients.[FN3] In addition to these doctors, several of Capener's employees testified that they felt he used fraudulent billing practices. However, the government presented only one witness who had actually observed any surgeries and that witness claimed to have watched only a couple of them.

> FN3. The figure of seventeen patients includes only those whose surgeries related to counts that were actually sent to the jury rather than being dismissed by the district court.

In response to the government's contention that there were no bone fragments in some of the relevant pathology samples, the defense called Dr. Mardini, the pathologist who had processed the samples. Dr. Mardini testified that there had been bone fragments in most, if not all of the pathology samples he examined. Another defense pathologist, Dr. Skoumal, explained that bone fragments need

not be separately listed on a pathology report as they can fall under the general category of sinonasal mucosa and Dr. Mardini had testified that, when he referred to sinonasal mucosa, he was including bone fragments. In addition, the defense presented pathology slides from patients treated by Capener. On these slides, the bone fragments were plainly visible.

The defense also addressed other elements of the government's case. In response to the contention that some of Capener's surgeries had been unnecessary, the defense presented testimony indicating that aggressive surgical intervention of the sort espoused by Capener was an accepted treatment philosophy and that CT scans of the type relied on by Dr. Rice did not always indicate whether a patient suffered from sinus symptoms. Further, Capener put on testimony supporting his use of the relevant billing codes. The defense also presented a video showing Capener rapidly performing a surgery that the prosecution had indicated should take a long period of time.

In its rebuttal case, the prosecution again called Dr. Rice. Dr. Rice disputed the accuracy of the billing codes that Capener had used in charging insurance companies. Dr. Rice also suggested that the presence of bone fragments did not indicate that Capener had performed exactly the kind of surgeries he had claimed.

Following the close of the evidence, the defense moved to dismiss all the charges against Capener. The district court dismissed all twenty-one health

care fraud and mail fraud counts alleging that Capener had performed unnecessary surgery, but sent to the jury the remaining twenty-five counts which alleged health care and mail fraud for unperformed surgeries and perhaps upcoding-although the record is not entirely clear on this point-and false statement. After a single day's deliberation, the jury acquitted Capener on all remaining counts.

(3)

Post-Trial Proceedings

Following the verdict, Capener moved for an award of fees under the Hyde Amendment. He argued that the prosecution's entire case was vexatious, frivolous and in bad faith. The government responded that its conduct did not entitle Capener to fees. In particular, the government argued (1) that its bone fragments*399 theory was based on an understandable mistake given that Dr. Mardini had sometimes separately listed the presence of bone fragments, suggesting that when he did not do so, bone fragments were not present, and (2) that the bone fragments theory was only one of the government's arguments at trial.

The district court held a hearing on the fee motion at which the judge made several pertinent remarks. For one, the district court denied Capener's request for documents from the prosecution, finding that Capener had not raised sufficient suspicion to justify an order to produce documents. Regarding the fee request, the district court stated at the start of the

hearing that:

> So far, subject to your arguments, I'm not convinced that the government moves in bad faith.... [F]rom the Court's own review of the proceedings, there was every reason to have suspicion and, of course, ultimately to obtain a finding of probable cause that criminal conduct had been engaged in.... So you've got an uphill battle....

The court later said that "it certainly is very possible that if this had been a civil lawsuit to recover fraud ... that the government ... could well have prevailed...." The court also stated that it could not "fault the government for bringing this case." Further, the district court stated, "I am going to award-I'm considering awarding maybe a quarter of the attorneys fees.... [T]hat initial view is based on some very brief statements in the briefs here. It will have to be based on a more careful review of the affidavits with regard to the extent of the injury to the defendant...." At the close of the hearing, the district court indicated that "I'm not presently, as I sit here, inclined to exceed, roughly, a quarter, or a third of the overall fees. So I'll do that with review and we'll award something accordingly, for the reasons I've stated here."

After the hearing, the district court produced a written order making findings of fact and law. The district court found that Capener was entitled to partial relief under the Hyde Amendment. Specifically, the district court held that "the Government pursued frivolous claims as to the fraud-related counts based on the Government's first

[theory]-the lack of bone in the pathology reports...." The district court reasoned that the "Government [either] consciously decided to proffer a theory it knew was false, or it failed to conduct any investigation ... to confirm whether Dr. Rice's contentions regarding lack of bone fragments was ... accurate." The district court also noted that the government had not indicated that Dr. Rice would testify regarding the bone fragments theory in its expert disclosure. Nonetheless, the district court found that the government had not acted in bad faith, noting that there was no evidence that Dr. Rice lied on the stand and that there was not sufficient evidence that the government consciously acted with ill will.

Additionally, the district court found that the government had not acted vexatiously with regard to its opposition to Capener's subpoenas for the medical records of his surgical patients or in its decision to follow leads provided by allegedly disgruntled informants. The district court concluded that there was no ill will in either case and that some of the counts had been worthy of being submitted to a jury. Finally, the district court found that Capener's counsel "has not demonstrated that the Court should depart from" the standard $125/hour rate. Accordingly, the district court granted Capener's counsel $279,015.50 in fees and costs.

*400 STANDARD OF REVIEW

"An award of attorney fees pursuant to the Hyde Amendment is reviewed for an abuse of discretion." *United States v. Sherburne*, 506 F.3d 1187, 1189

(9th Cir.2007). Discovery orders under the Hyde Amendment are reviewed for abuse of discretion. *United States v. Lindberg*, 220 F.3d 1120, 1126 (9th Cir.2000). We recently clarified the meaning of the "abuse of discretion" standard of review "in the context of a trial court's factual findings, as applied to legal rules." *See United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir.2009) (en banc). We employ a two-step inquiry to determine whether a district court abused its discretion in applying law to facts in a manner that is "essentially factual." *Id.* at 1259, 1261. First, we determine de novo "whether the trial court identified the correct legal rule to apply to the relief requested." *Id.* at 1261-62. If it did, we then evaluate the trial court's application of this legal standard to the facts of the case and may reverse only if its application was "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* at 1262(internal quotation marks omitted).

DISCUSSION

(1)

The Government's Appeal

On appeal, the government argues that the district court erred by considering the alleged flaws in the prosecution's case piecemeal rather than asking whether the case viewed as a whole met the Hyde Amendment's standards for an award of fees. Capener responds that the district court did view the alleged shortcomings of the prosecution in the context of the case as a whole and that, even if it had

not, it would not have been error to focus only on the allegedly flawed portions of the government's case. In fact, the district court conducted a piecemeal analysis of the government's case. Whether this approach was proper or not is something we need not decide because even if a piecemeal approach is permissible, the district court's conclusion that a portion of the government's case was frivolous lacks support in inferences that may be drawn from the facts in the record. *Cf. Hinkson*, 585 F.3d at 1262.

The Hyde Amendment provides that:

> [T]he court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) ... may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that *the position of the United States was vexatious, frivolous, or in bad faith,* unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided ... under section 2412 of title 28, United States Code.

18 U.S.C. § 3006A note (emphasis added).[FN4]

> FN4. This case requires consideration only of the threshold question of whether a claimant receives any fees at all. Although it is unnecessary to decide the issue, it is worth noting that the amount of fees awarded may be subject to different considerations from

those discussed here. *Cf. Comm'r, Immigration and Naturalization Serv. v. Jean,* 496 U.S. 154, 160-61, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990) (discussing the Equal Access to Justice Act "EAJA"); *United States v. Heavrin,* 330 F.3d 723, 730 (6th Cir.2003) (noting that EAJA cases are informative in interpreting the Hyde Amendment).

Thus, under the Hyde Amendment, a victorious defendant may be able ***401** to recover legal fees upon showing that the position of the United States was either vexatious, frivolous or in bad faith. 18 U. .S.C. § 3006A note. However, "the burden is on the defendant in the underlying case." *Manchester Farming,* 315 F.3d at 1182. On the other hand, "[t]he elements are disjunctive; thus, the defendant need only prove one of the three elements to recover." *Id.* Regardless of the element a prevailing defendant advances, "the Hyde Amendment [is] targeted at prosecutorial misconduct, not prosecutorial mistake." *United States v. Braunstein,* 281 F.3d 982, 995(9th Cir.2002) (quoting *United States v. Gilbert,* 198 F.3d 1293, 1304 (11th Cir.1999)). Indeed, "mere 'faulty judgment' is not vexatious, frivolous, or in bad faith." *United States v. Tucor Intern., Inc.,* 238 F.3d 1171, 1180 (9th Cir.2001).

As noted above, although the district court did not find that the government had acted vexatiously or in bad faith, it did find that the bone fragments theory was frivolous. In doing so, it correctly identified the legal standard for measuring frivolousness. Frivolousness is defined objectively. A " 'frivolous' case is one that is groundless.... [A] case is frivolous

when the government's position was foreclosed by binding precedent or so obviously wrong as to be frivolous." *Manchester Farming*, 315 F.3d at 1183(internal quotation marks omitted). However, in applying this legal standard to the facts of the case, the district court abused its discretion.

The district court based its frivolousness finding primarily upon the fact that a more thorough investigation by the prosecutors would have revealed that the pathology samples actually did contain bone fragments. As it happened, the government did interview the pathologist, Dr. Mardini, but did not discover that the samples contained bone fragments. This was a regrettable mistake-a clear failure by the prosecution to do its homework. The district court's finding that it was misconduct of the sort that could justify a fee award, however, goes too far.

It is true that, under limited circumstances, a failure by the government to thoroughly investigate a case can constitute frivolousness. *See Braunstein*, 281 F.3d at 996-97. However, a failure to sufficiently investigate generally can rise to the level of frivolousness only when the government had some affirmative reason to know that further investigation was needed. For example, the *Braunstein* court found that the prosecutors acted frivolously when they had substantial information affirmatively calling their theory into question and pointing the way to further evidence but failed to investigate further. *Id.* In our case, by contrast, there is no evidence that the government had any affirmative reason to believe that its bone fragments theory was wrong.

Indeed, the government argues that it relied on Dr. Rice's expert opinion and therefore did not act frivolously with respect to the bone fragments theory. Because Dr. Rice never indicated any need for further investigation, the government contends, their failure to confirm that the pathology samples did not contain bone fragments does not justify a finding of frivolousness.

Where the government ceases investigation in reliance on the opinion of an expert and that expert has not indicated a need for any further investigation, the government generally has not acted frivolously. Cases from several areas of law indicate that this kind of reliance usually does not fall below minimum professional standards. *See, e.g., Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir.1995)***402** (considering a claim of ineffective assistance of counsel); *Dubois v. U.S. Dep't of Agriculture*, 270 F.3d 77, 83 (1st Cir.2001) (considering a denial of sanctions). Though there do not appear to be any Hyde Amendment cases on point, the cases cited above still suggest that such reliance is generally not "obviously wrong," as required for a finding of frivolousness. To be sure, *Hendricks* and *Dubois* do not apply particularly demanding tests of attorney competence. They are, however, still relevant to the case at hand. The Hyde Amendment does not require excellence-it targets "prosecutorial misconduct, not prosecutorial mistake." *Braunstein*, 281 F.3d at 995. "[M]ere 'faulty judgment' is not vexatious, frivolous, or in bad faith." *Tucor*, 238 F.3d at 1180. Reliance on an expert may well be faulty judgment in a given

instance, but it generally will not constitute misconduct of the sort sanctioned by the Hyde Amendment, absent some affirmative reason for the government to know such reliance is misplaced.

Capener responds first that, as a factual matter, the government was not actually relying on Dr. Rice's expertise but had instead misled him-intentionally or otherwise-as to the contents of the pathology samples. Second, Capener contends that, even if the government had relied on Dr. Rice, that reliance would not automatically prevent liability under the Hyde Amendment. As to his first contention, Capener argues that Dr. Rice depended on the prosecutors for information to such a degree that he was relying on them rather than the other way around. This issue centers on what the prosecutors told Dr. Rice regarding Dr. Mardini's pathology reports. Dr. Rice's affidavit indicates that the prosecutors told him that Dr. Mardini had "verified the content of his reports."

This hardly diminishes the prosecutors' reliance on Dr. Rice's expertise. The fact that the prosecutors told Dr. Rice that Dr. Mardini "verified" his reports could mean one of two things: either that the prosecutor told Dr. Rice that the reports were truthful or that the prosecutors told Dr. Rice how to interpret the reports. In order for Rice to have made his error in reliance on the prosecutors, they would had to have told him how to interpret the reports. Dr. Rice's error was one of interpretation-deciding that the fact that a pathology report did not specifically mention bone fragments meant that no bone fragments were actually present. There is no

reason to think that the prosecutors told Dr. Rice how to interpret the pathology reports or that he would have listened to them even if they had. The interpretation of a pathology report is a technical matter not a legal one. Accordingly, there is no basis for claiming that the prosecutors were not acting in reliance on Dr. Rice when they halted their investigation of the bone fragments theory.

Moreover, even if there are circumstances under which a prosecutor's reliance on an expert would not shield the government from liability under the Hyde Amendment, this case does not present such a situation. There is nothing else about the facts surrounding the prosecutors' reliance on Dr. Rice that suggests that this reliance was frivolous. Dr. Rice was an expert in his field and did not indicate that he needed any additional information regarding the absence of bone fragments in the pathology samples. Though the government apparently failed to ask the pathologist, Dr. Mardini, about the bone fragments issue, there was no specific indication that it was necessary to do so. Moreover, some of Dr. Mardini's pathology reports specifically indicated the presence of bone fragments, making it reasonable to infer, as Dr. Rice and the ***403** government apparently did, that where a report did not specifically indicate bone fragments, that sample did not contain bone fragments.[FN5]

> FN5. Moreover, during the trial, the prosecution spoke with a pathologist named Dr. Samuel Parks. Dr. Parks indicated that, if some reports specifically mention the presence of bone fragments, it would be normal to

> assume that reports that do not specifically mention bone fragments indicate that the samples do not contain bone fragments. Dr. Parks also indicated that a report should specifically mention bone fragments when it contains bone fragments. Dr. Parks concluded that it was proper to interpret the reports written by Dr. Mardini that did not specifically mention bone fragments as reflecting the fact that the samples did not contain bone fragments. This buttresses the conclusion that the prosecution did not err in a manner that should subject them to liability under the Hyde Amendment.

The strongest point for Capener on the issue of whether the prosecutors were frivolous with respect to the bone fragments theory is the fact that the district court's finding on this point is entitled to deference. The district court wrote that:

> [E]ither the Government consciously decided to proffer a theory it knew was false, or it failed to conduct any investigation or inquiry to confirm whether Dr. Rice's contentions regarding lack of bone fragments was in fact accurate. In addition, the government failed to produce to Capener expert disclosures from Dr. Rice, who discussed the lack of bone as a basis for his opinion. Taken together, these facts indicate the Government had reason to believe their lack-of-bone theory was without support.

This finding, however, is implausible based on the record in this case. The record simply does not

substantiate the assertion that the government knew or had reason to believe that its lack of bone fragments theory was false. As explained above, the primary fact cited by the district court in this regard-the government's reliance on Dr. Rice's opinion and attendant failure to question Dr. Mardini pre-trial about the lack of bone fragments theory-was an understandable error that does not support the conclusion that the government pursued an obviously incorrect theory.

The only additional fact cited by the district court in support of its frivolousness conclusion is that the government's pre-trial expert witness disclosure did not specifically indicate that Dr. Rice would base some of his testimony on the absence of bone fragments in the pathology sample. The government, however, told Capener's prior attorney about this basis for Dr. Rice's opinions at an earlier stage of the case. Though the failure to include this information in the expert witness disclosure is regrettable, the fact that defendant's prior counsel was informed of the relevant information in another way indicates that there was no intent to deceive and no reckless disregard for the truth. Because the failure to disclose was not done with a culpable mental state, it cannot be evidence of willful blindness on the part of the prosecutors.

Finally, there is no basis in the record for the district court's statement that the government might have consciously advanced a false theory. Indeed, this contention is contradicted by the district court's later finding that the government did not "conspire[with Dr. Rice] to knowingly present false testimony."

Accordingly, the district court's finding that the government's conduct regarding the bone fragments theory was frivolous is unsupported by the record and unsustainable.

(2)

Capener's Cross-Appeal

Turning to Capener's argument that he should have been awarded fees for *404 the entire case, Capener raises several challenges to the government's conduct. First, he claims that the structure of the government's case was inappropriate. He argues that the prosecutors should not have tried to criminalize a difference in medical opinion regarding what treatments were necessary or structured a prosecution around highly technical medical billing codes. In fact, there was nothing improper about these aspects of the government's case. Capener was not being charged with treating patients on the basis of erroneous medical views-he was being charged with fraud for allegedly performing surgeries that he did not genuinely believe were necessary. The evidence presented by the prosecution to the effect that the surgeries were not actually necessary tended to show that Capener could not have subjectively believed they were necessary given his medical training and experience. Similarly, the government's arguments regarding Capener's use of billing codes were proper. Regardless of how complex the codes are, if Capener willfully upcoded procedures, that could constitute fraud.

Second, Capener argues that the prosecution's

conduct during the investigation was actionable under Hyde Amendment. His central argument is that the government must have been attempting to suppress or at least avoid the truth.[FN6] Capener faults the government for opposing his initial attempt to obtain subpoenas for the medical records of his patients. Capener sought these subpoenas in order to demonstrate that the patients had a history of sinus problems and therefore may have looked like they needed treatment. The district court, however, correctly found that there was nothing wrong with the government's initial opposition. Capener's initial subpoenas were invalid because, among other things, they did not comply with the privacy protections in HIPAA. There cannot be anything improper with opposing a legally invalid subpoena. Moreover, the government did not oppose the bulk of Capener's second round of subpoenas, which were HIPAA compliant, indicating that the prosecution merely wanted subpoenas that were legally valid.

> FN6. Capener also alleges that this case arose against a background of malicious complaints by individuals who were biased against him such as doctors who were business competitors of his and that the government relied partly on disgruntled employees of Capener's as witnesses. Of course, the government must often rely on individuals who may have some agenda. This cannot give rise to Hyde Amendment liability here, however, given that the government recruited witnesses with no personal bias against Capener, such as Dr. Rice.

Also regarding the government's conduct during the investigative phase of the case, Capener insists that the prosecution must have known that his patients had a history of sinus problems and thus that surgery might have appeared necessary. Capener bases this contention on the fact that the case was referred to the government by an insurance company. He presumes that the insurance company had the relevant medical records and that the insurance company would have communicated the relevant facts about the patients' sinus problems to the prosecutors in making the referral. Capener argues that, if the prosecutors had known of these sinus problems, it could suggest that they were attempting to avoid the truth. The presence of prior sinus symptoms could at least arguably tend to show that Capener might have believed that the patients in question needed surgery because they had a history of sinus problems.

However, there is no real evidence that the prosecutors knew that some of Capener's patients had prior sinus problems. Nor is it necessarily true that the fact that *405 the case was referred by an insurance company indicates that the prosecutors would have known of the sinus problems. The insurance company may not have informed the prosecutors of the patients' full medical histories or may not have had all the information itself. Capener argues that, even if the prosecutors did not know of these prior sinus problems, they should have sought the relevant medical records and uncovered this fact for themselves. In an ideal world, perhaps, the prosecutors would have tracked down these records.

However, their failure to do so was, at worst, negligence. Mere negligence cannot form the basis of an award under the Hyde Amendment.

Braunstein, 281 F.3d at 995; *see also In re 1997 Grand Jury*, 215 F.3d 430, 436 (4th Cir.2000).

Capener also argues that the prosecution acted in bad faith, specifically with regard to Dr. Rice's testimony. As noted above, the district court specifically found that the prosecution did not intentionally proffer false testimony from Dr. Rice. Capener presents no substantial evidence to the contrary. Indeed, there is no basis for claiming that Dr. Rice's testimony was willfully false, rather than erroneous. Capener claims that Dr. Rice implied he had personal knowledge of facts that he actually had gleaned from reports created by other doctors. Whether Dr. Rice implied personal knowledge at trial is debatable, but even if he did, it hardly shows intentional or willful misconduct. Capener also stresses that the prosecution knew Dr. Rice would testify without having actually seen the pathology slides and argues that this shows an element of willful blindness. This is, however, a highly technical area. To rely on medical reports rather than the slides is hardly unreasonable. For the reasons stated above, there was nothing egregious about relying on Dr. Rice.

Thus, having found that the government's advancement of the bone fragment theory was not frivolous, we see nothing further in the prosecution's case to suggest that liability was appropriate under the Hyde Amendment. Accordingly, no fee award

should have been granted in this case.

(3)

Capener's Discovery Motion

Capener further contends that the district court erred by refusing to grant him discovery in support of his motion for fees. Were this the case, a remand might be necessary so that the results of any such discovery would be available in deciding whether to award fees. However, the district court did not err in refusing to grant discovery on Capener's Hyde Amendment claim.

The Hyde Amendment's tools for developing evidence are extremely limited. As noted above, the Hyde Amendment's procedures are based on the EAJA, which provides that a party's entitlement to fees shall be "determined on the basis of the record ... which is made in the civil action for which fees and other expenses are sought." 28 U.S.C. § 2412(d)(1)(B). The Eleventh Circuit has remarked that "Congress added this language to ensure that the substantial justification determination will not involve additional evidentiary proceedings or additional discovery of agency files, solely for EAJA purposes." *United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558, 1564-65 (11th Cir.1988) (internal quotation marks omitted).

The Hyde Amendment itself provides little additional scope for investigating the government's conduct. One portion of the Hyde Amendment

indicates that "the court, for good cause shown, may receive evidence ex parte and in camera...." 18 *406 U.S.C. § 3006A note. Though this provision does not provide for traditional discovery in so many words, we have previously suggested that it might make some form of evidentiary development possible on a showing of good cause. *United States v. Lindberg*, 220 F.3d 1120, 1126(9th Cir.2000).

The exact scope of this provision need not be decided here. The district court found that Capener had failed to show good cause for requiring the government to produce evidence. That finding was not an abuse of discretion. As the district court noted, Capener sought documents primarily to substantiate his claims that the prosecution acted in bad faith-but he failed to present any evidence to the district court supporting his allegations of bad faith on the part of the prosecutors.

Under these circumstances, it was not an abuse of discretion to deny discovery.

CONCLUSION

For the reasons stated above, the district court's judgment awarding partial fees is reversed, and Capener's cross-appeal seeking full fees is rejected.

No. 07-10359 (main appeal) REVERSED.

No. 07-10372 (cross-appeal) AFFIRMED.

3. District Court Order and Opinion Concerning the Fee Award (June 17, 2007)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)
3:05-CR-0114-RCJ-RAM
Plaintiff,)
vs.)
)
ORDER
MARK CAPENER,)
Defendant.)

This matter comes before the Court on Defendant's Motion for Attorneys' Fees and Expenses. (#228.) The Court has considered the Motion, the pleadings on file, and oral argument on behalf of all parties and issues the following Order.

BACKGROUND

Defendant Dr. Mark Capener ("Capener" or "Defendant"), a doctor specializing in ear, nose, and throat procedures, seeks attorneys' fees under the Hyde Amendment. On May 5, 2005, the Government charged Capener with thirty-eight counts of health care fraud under 18 U.S.C. § 1347, and five counts of mail fraud under 18 U.S.C. § 1341. On July 27, 2005, the Government obtained a superseding indictment charging Capener with thirty-eight counts of health care fraud, thirteen counts of mail fraud, and one

count for making a false statement to a Federal Bureau of Investigation officer under 18 U.S.C. § 1001. The Government alleged that Capener knowingly and willfully devised a scheme whereby he defrauded numerous health care benefit programs in connection with the delivery of or payment for health care benefits. More specifically, the Government alleged that Capener would "upcode" or charge for a service reimbursable at a higher rate than appropriate for the service actually provided. According to the Government, Capener would send bills with codes representing surgeries and procedures not actually performed or not needed to the health care benefit programs through the U.S. mail system. Thus, the Government accused Capener of knowingly billing for unnecessary procedures and/or procedures never actually performed with the intent to defraud the health care benefit programs to increase his income.

The Government relied heavily on one of its principal expert witnesses, Dr. Dale Rice. Dr. Rice is a medical doctor specializing in otolaryngology, commonly referred to as an ear, nose, and throat ("ENT") doctor. Dr. Rice offered testimony to prove two main points: (1) Capener did not perform surgeries for which he billed; and (2) Capener performed unnecessary surgeries on his patients. Dr. Rice based his testimony, and the Government established their case, on four main theories or "pillars." First, Dr. Rice testified that no bone fragments were reported in the pathology reports. Dr. Rice indicated the lack of bone fragments was extremely important because it established that Capener did not perform many of the procedures for

which he billed. According to Dr. Rice, if Capener had in fact performed the nasal surgeries listed in his billings, the pathology report would have contained bone fragments. Second, Dr. Rice testified that Capener could not have performed the surgeries for which he billed within the time limits he asserted in his billings. Third, Dr. Rice indicated that the CT scans on certain patents indicated that no surgical procedures had been performed. Finally, Dr. Rice testified that the CT scans further confirmed Capener billed for procedures beyond those he actually performed.

On October 2, 2006, trial commenced in Reno, Nevada. Before trial began the Court dismissed several counts in the Superseding Indictment. During the course of trial it became evident the Government could not sustain indictments based on some of their "pillars" described above. The Court therefore further dismissed additional counts prior to submitting the case to the jury. In total, the Court dismissed twenty-seven counts before submitting the case to the jury for deliberation. On November 2, 2006, the jury returned a verdict of not guilty on all remaining counts.

Capener now moves the Court for attorneys' fees and costs. Capener claims the Government based its case on deliberately false testimony. Capener further asserts the Government willfully concealed the deficiencies in its case by suppressing evidence and knowingly providing false testimony to the jury. More specifically, Capener contends the Government presented a frivolous case, acted vexatiously, and prosecuted its case in bad faith.

DISCUSSION

I. The Hyde Amendment

As noted above, Defendant seeks fees and costs under the Hyde Amendment. Congress enacted the Hyde Amendment as a method through which to sanction the Government for "prosecutorial misconduct." *United States v. Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002) (citation omitted). The Hyde Amendment provides in relevant part:

> The court, in any criminal case . . . may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code.

18 U.S.C. § 3006A. Modeled after the Equal Access to Justice Act ("EAJA"), the Hyde Amendment requires a more demanding burden of proof than the EAJA. *United States v.Lindberg*, 220 F.3d 1120, 1124 (9th Cir. 2000). Under the EAJA, a defendant will prevail unless the Government can prove its position was substantially justified. *Id.* "However, recovering attorney fees and costs under the Hyde Amendment requires a stronger showing." *United States v. Manchester Farming P'Ship*, 315 F.3d

1176, 1182 (9th Cir. 2003) (citations omitted). Under the Hyde Amendment, Capener bears the burden "to prove the Government's position was vexatious, frivolous, or in bad faith." *Id.* (citing *Lindberg*, 220 F.3d at 1125). "The elements are disjunctive; thus, the defendant need only prove one of the three elements to recover." *Id.* (citation omitted). Congress did not define the terms "vexatious," "frivolous," or "bad faith" in the Hyde Amendment, but the Ninth Circuit has defined all three terms. The Ninth Circuit has warned: "'[T]he Hyde Amendment should not be an exercise in 20/20 hindsight based solely on Reasonableness,' but rather should account for the fluidity of the trial process." *Id.* (quoting *United States v. Sheburne*, 249 F.3d 1121, 1127 (9th Cir. 2001)).

A. Pursuit of a Frivolous Case

A "frivolous" case is one that is "groundless . . . with little prospect of success; often brought to embarrass or annoy the defendant." *United States v. Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002). A case is frivolous when "the government's position was foreclosed by binding precedent or so obviously wrong as to be frivolous." *Id.* (quoting *Gilbert*, 198 F.3d at 1304) (internal quotation marks omitted). While a finding of bad faith requires actual "ill will" or "dishonest purpose," *see Manchester*, 315 F.3d at 1185, a showing of frivolousness may be made based on a finding that the prosecution had "reason to believe" its case had no support. *See Braunstein*, 281 F.3d at 996. In this case, the Government had reason to believe that its fraud theory based on the absence of bone in the pathology slides lacked merit.

Prior to trial, the Government interviewed Dr. Mardini, the pathologist who produced the reports. At trial, Dr. Mardini testified that contrary to the Government's assertion, bone fragments existed in all the pathology slides, and that he would have so told anyone who asked him before trial. The evidence confirmed that Capener's pathology slides contained bone fragments. This showing completely destroyed one of the Government's main arguments in support of its case. As noted above, the Government interviewed Dr. Mardini and discussed the case with him before trial. The Government contends it did not ask Dr. Mardini about the pathology reports. While Dr. Mardini provided a sworn affidavit wherein he stated that he did "not recall whether [he] was ever specifically asked about the presence of bone in the slides" (#243-2 at 2), he did confirm that his investigation conclusively demonstrated bone fragments in the pathology reports for Capener's surgeries. Either the Government consciously decided to proffer a theory it knew was false, or it failed to conduct any investigation or inquiry to confirm whether Dr. Rice's contentions regarding lack of bone fragments was in fact accurate. In addition, the Government failed to produce to Capener expert disclosures from Dr. Rice, which discussed the lack of bone as a basis for his opinions. Taken together, these facts indicate the Government had reason to believe their lack-of-bone theory was without support. The Government had the ability to overcome Dr. Rice's failure to investigate the basis for his opinion regarding the lack of bone in the pathology slides. In this regard, this case is on point with *Braunstein*. Accordingly, the Court finds that

the Government pursued frivolous claims as to the fraud-related counts based on the Government's first pillar – the lack of bone in the pathology reports from surgery.

B. Bad Faith

Bad faith is "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." *Manchester*, F.3d at 1185 (citation omitted). Defendant argues the Government acted in bad faith because Dr. Rice perjured himself with regards to the pathology slides, and "it seems unlikely that the government was unaware that the testimony was false." (#228-1.) However, while Defendant has presented evidence that the Government had reason to believe that one of Dr. Rice's "pillars" lacked sufficient support for conviction based on fraud, Defendant has not presented any direct evidence that the Government actually participated with or encouraged Dr. Rice in his alleged perjury (or more appropriately, error or false assumption; there is certainly no basis to allege perjury on the doctor's part). Further, while Defendant has demonstrated that Dr. Rice may have very well acted negligently in his failure to explore the basis for his opinions, he has not presented sufficient evidence that Dr. Rice intentionally lied on the stand. Certainly Dr. Rice's testimony regarding the lack of bone was incorrect; however, the record does not establish that the Government and Dr. Rice conspired to knowingly present false testimony. Defendant has not

presented sufficient evidence that the Government consciously acted with ill will. Accordingly, the Court finds the Government did not act in bad faith.

C. Vexatious Conduct

Defendant may also recover fees and costs if he can prove the Government's actions were vexatious. "Vexatious" has both a subjective and objective element: "[S]ubjectively, the Government must have acted maliciously or with an intent to harass; objectively, the suit must be deficient or without merit." *United States v. Manchester Farming P'Ship*, 315 F.3d 1176, 1182 (9th Cir. 2003) (citing *United States v. Sheburne*, 249 F.3d 1121, 1126-27 (9th Cir. 2001)). To prove vexatiousness, Defendant must show the Government acted with "ill intent." *Sheburne*, 249 F.3d at 1127 n.5.

Defendant argues the Government's efforts to prevent defense counsel from obtaining medical records was vexatious. However, the record indicates that the Government took such action because it believed Defendant was seeking to obtain the records in violation of HIPPA. Thus, this conduct does not demonstrate the Government acted vexatiously. Defendant also appears to argue that the Government acted vexatiously by intentionally harassing Defendant by pursuing investigations instigated by vengeful tipsters or informants. However acting on tips or information from those who allegedly hold grudges is not vexatious. *Manchester Farming P'Ship*, 315 F.3d at 1182-83 ("Tipsters, by their nature, often hold grudges against the reported parties. It does not follow that

the Government harassed, acted maliciously, or with an "ill intent" simply because it followed up on such a tip."). Further, while this Court dismissed several counts for lack of evidence, the Court did allow some counts to proceed to the jury. Thus, some counts were not "deficient or without merit." *See id.* at 1182. Defendant has not demonstrated that the Government acted vexatiously in this case.

D. Amount of Fees and Costs

Because the Court finds Defendant has satisfied the frivolous standard in regards to those claims based on lack of bone under the Hyde Amendment, Defendant may recover fees and costs. Under 28 U.S.C. § 2412(d)(2)(A), Congress has defined "fees and other expenses" to include "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees . . . ." However, § 2412 further states in part:

> The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $ 125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited

> availability of qualified attorneys for the proceedings involved, justifies a higher fee.

§ 2412(d)(2)(A). As noted above, the Court finds that the Government had reason to believe the counts against Capener based on its first pillar–no presence of bone in the pathology slides–lacked merit. The Court therefore awards attorneys' fees and costs incurred by Defendant in refuting this first pillar. Defendant has submitted expense reports detailing these costs. (*See* #228, Ex. 1-4.) Therefore, the Court awards $175,006.50 in costs for expert witnesses and other related charges permissible under § 2412(d)(2)(A).[1] The Court further awards attorneys' fees. However, Defendant has not demonstrated that the Court should depart from the $125 per hour cap. Accordingly, the Court awards $104,009 in attorneys' fees.[2]

CONCLUSION

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[1] This figure represents expenses and costs identified by Defendant as relating to costs incurred in refuting the Government's argument of lack of bone on the pathology reports and slides.

[2] This figure represents Defendant's attorneys' fees incurred in refuting the Government's lack-of- bone argument. (*Id.*) As noted above, the Court applies the $125 cap.

Pursuant to the above analysis, IT IS HEREBY ORDERED that Defendant's Motion for Attorneys' fees and Expenses (#228) is *granted in part and denied in part.* The Court awards $175,006.50 in costs and $104,009 in attorneys' fees.

DATED: June 18, 2007

ROBERT C. JONES
UNITED STATES
DISTRICT JUDGE

No. 10-327

In the Supreme Court of the United States

MARK CAPENER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to an award of an attorney's fee and litigation expenses under the Hyde Amendment, Pub. L. No. 105-119, Tit. VII, § 617, 111 Stat. 2519 (1997) (18 U.S.C. 3006A note), following his acquittal on charges of committing health care fraud, committing mail fraud, and making false statements.

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No. 10-327

MARK CAPENER, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 28a-55a) is reported at 608 F.3d 392. The order of the district court (Pet. App. 56a-66a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2010. A petition for rehearing was denied on June 9, 2010 (Pet. App. 29a). On the same day, the court entered an amended opinion. The petition for a writ of certiorari was filed on September 7, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner was acquitted of 17 counts of committing health care fraud, in vio-

lation of 18 U.S.C. 1347(1); seven counts of committing mail fraud, in violation of 18 U.S.C. 1341; and one count of making false statements, in violation of 18 U.S.C. 1001. He moved for an award of an attorney's fee and litigation expenses under the Hyde Amendment, Pub. L. No. 105-119, Tit. VII, § 617, 111 Stat. 2519 (1997) (18 U.S.C. 3006A note). The district court granted petitioner's motion in part, awarding fees and expenses related to petitioner's defense against certain counts associated with one of the theories advanced by the government, on the ground that the government's theory was frivolous. The court of appeals reversed. Pet. App. 28a-55a.

1. Petitioner was an otorhinolaryngologist practicing in Nevada. In July 2005, after the government received a tip from an insurance company and conducted an almost-four-year investigation that included consultation with two physician experts, a grand jury in the District of Nevada returned a superseding indictment charging petitioner with 38 counts of committing health care fraud, in violation of 18 U.S.C. 1347(1); 13 counts of committing mail fraud, in violation of 18 U.S.C. 1341; and one count of making false statements, in violation of 18 U.S.C. 1001. The indictment alleged that petitioner had billed for sinus surgeries that were either "unnecessary, never performed," or exaggerated for billing purposes ("upcoded"). Pet. App. 30a-32a; Gov't C.A. Br. 5-8.

One of the experts consulted by the government during its investigation was Dr. Dale Rice, chairman of the Department of Otolaryngology at the University of Southern California. Dr. Rice reviewed petitioner's patient files, pathology reports, and CT scans and concluded that many of the surgeries that petitioner billed

for either were unnecessary or were not performed. Dr. Rice indicated to the government that his conclusions were supported by several factors, one of which was the fact that no bone fragments had been noted in reports of pathology samples taken from some of petitioner's patients. Dr. Rice theorized that, because some of the surgeries that petitioner claimed to have performed would require breaking bones, bone fragments should have been present in the pathology samples. In the case of samples for which the report did not indicate the presence of bone fragments, Dr. Rice reasoned that the associated surgery must not have been performed. Dr. Rice never indicated to the prosecutors that he needed further information or clarification regarding the presence or absence of bone fragments in those pathology samples. Pet. App. 32a-33a; Gov't C.A. Br. 5-6.

Dr. Rice testified for the government at trial. In opining that petitioner had not performed surgeries for which he had billed, Dr. Rice again relied on several theories, only one of which was the absence of bone fragments in the pathology reports, and he mentioned the absence of bone fragments only as to some patients. The government also presented the testimony of six other doctors to substantiate the charges against petitioner, and called several of petitioner's employees, who testified that petitioner had engaged in fraudulent billing practices. Pet. App. 35a-36a; Gov't C.A. Br. 8-14.

After Dr. Rice testified, it was discovered that most of the pathology samples in question did in fact contain bone fragments; the pathologist had failed to note that fact in some of his pathology reports, despite noting the presence of bone fragments in other reports. Although the government had interviewed the pathologist during its investigation, it had not discovered that the pathol-

ogy samples did in fact contain bone fragments. Pet. App. 33a-34a, 36a-37a; Gov't C.A. Br. 15-16.

Following the close of the evidence, petitioner moved to dismiss all charges against him. The district court dismissed some counts (though not those related to the bone-fragment issue), and sent others to the jury. The jury acquitted petitioner on those counts. Pet. App. 37a-38a; Gov't C.A. Br. 17-18.

2. Petitioner moved for an attorney's fee and litigation expenses under the Hyde Amendment, seeking almost $1.4 million.[1] Pet. App. 38a. At a hearing, the district court stated that the government had "every reason to have suspicion and, of course, ultimately to obtain a finding of probable cause that criminal conduct had been engaged in" and that it could not "fault the government for bringing this case." *Id.* at 39a. The court added, however, that it was "considering awarding maybe a quarter of the attorneys fees." *Ibid.*

In a subsequent written order, the district court granted in part and denied in part petitioner's motion, awarding approximately $280,000 in attorney's fees and litigation expenses. Pet. App. 56a-66a. The court stated that the government's position was not in bad faith because the government had not "consciously acted with ill

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[1] The Hyde Amendment provides in relevant part:

> [T]he court, in any criminal case * * * may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code.

18 U.S.C. 3006A note.

will." *Id.* at 62a-63a. The court found that Dr. Rice was negligent and testified incorrectly, but stated that there was no evidence that he intentionally lied on the stand or that the government "actually participated with or encouraged Dr. Rice" in presenting erroneous testimony. *Id.* at 62a. Likewise, the court found that the prosecution was not vexatious because the government did not act maliciously or with an intent to harass, and because some of the counts against petitioner had merit objectively. *Id.* at 63a-64a.

The district court concluded, however, that part of the government's position was frivolous because the government "had reason to believe that its fraud theory based on the absence of bone in the pathology slides lacked merit." Pet. App. 60a. According to the court, "[e]ither the Government consciously decided to proffer a theory it knew was false, or it failed to conduct any investigation or inquiry to confirm whether Dr. Rice's contentions regarding lack of bone fragments was in fact accurate." *Id.* at 61a. The court thus concluded that the government pursued frivolous claims as to the fraud-related counts "based on the Government's first pillar—the lack of bone in the pathology reports from surgery." *Id.* at 61a-62a.

3. Both parties appealed, and the court of appeals reversed, holding that the district court should have denied petitioner's motion in its entirety. Pet. App. 28a-55a. The court first held that the district court clearly erred in concluding that part of the government's case was frivolous. It explained that although the government's failure to discover before trial that the pathology samples contained bone fragments was a "regrettable mistake," it was not "misconduct of the sort that could justify a fee award." *Id.* at 44a. The panel recognized

that, "under limited circumstances, a failure by the government to thoroughly investigate a case can constitute frivolousness," *ibid.* (citing *United States* v. *Braunstein*, 281 F.3d 982, 996-997 (9th Cir. 2002)), but explained that "a failure to sufficiently investigate generally can rise to the level of frivolousness only when the government had some affirmative reason to know that further investigation was needed," *ibid.* Here, the court of appeals held, "there [was] no evidence that the government had any affirmative reason to believe that its bone fragments theory was wrong" because the government relied on the opinion of an expert who did not indicate a need for any further investigation. *Id.* at 44a-45a. The court emphasized that "[t]he record simply does not substantiate the assertion that the government knew or had reason to believe that its lack of bone fragments theory was false," *id.* at 48a-49a, and it could find "no basis in the record for the district court's statement that the government might have consciously advanced a false theory," *id.* at 49a.

Next, the court of appeals rejected petitioner's argument that he should have been awarded fees for the entire case. Agreeing with the district court, the court of appeals found "nothing improper" about the government's theory of the case, Pet. App. 50a, and it saw "nothing wrong" with the government's initial opposition to petitioner's initial efforts to subpoena certain medical records because the subpoenas themselves were "legally invalid," *id.* at 51a. The court further found that, even assuming the government should have sought medical records that in petitioner's view would have undercut its theory, the government's "failure to do so was, at worst, negligence," which "cannot form the basis of an award under the Hyde Amendment." *Id.* at 52a-53a. In addi-

tion, the court held that petitioner offered nothing substantial to contradict the district court's finding that the government did not intentionally proffer false testimony from Dr. Rice; "[i]ndeed," the court held, "there is no basis for claiming that Dr. Rice's testimony was willfully false, rather than erroneous." *Id.* at 53a. In sum, the court of appeals concluded, "no fee award should have been granted in this case." *Id.* at 53a-54a.

Finally, the court of appeals held that the district court did not err in denying petitioner's request for discovery in support of his motion. The court explained that, even assuming the Hyde Amendment provides for some level of discovery in certain circumstances, petitioner had "failed to show good cause for requiring the government to produce evidence," and thus the district court did not abuse its discretion in denying discovery. Pet. App. 54a-55a.

ARGUMENT

Petitioner contends that this Court's review is necessary to resolve "doctrinal dissonance" (Pet. 21) regarding the standards for a Hyde Amendment award and to decide whether Hyde Amendment movants are entitled to discovery. Pet. 21-33. Petitioner also asserts that the Ninth Circuit's "clearly erroneous" standard "seems inconsistent" (Pet. 34) with this Court's precedent. Pet. 33-35. Petitioner's claims lack merit, there is no meaningful division among the courts of appeals, and petitioner offers no explanation why a different interpretation of the Hyde Amendment would lead to a different result in his case. The court of appeals' factbound decision warrants no further review.

1. Petitioner argues (Pet. 21-31) that the courts of appeals have failed to produce "any satisfactory consen-

sus" (Pet. 24) regarding the standards for a Hyde Amendment award. Although different courts have sometimes used different phrases in discussing the Hyde Amendment's provisions, there is no fundamental disagreement that would warrant this Court's review—much less a disagreement that would be outcome-determinative in petitioner's case. The court of appeals' decision is correct.

a. As petitioner notes, the Eleventh Circuit, in *United States* v. *Gilbert*, 198 F.3d 1293 (1999), was the first court to analyze the Hyde Amendment in depth and provide definitions for the terms "vexatious," "frivolous," and "bad faith" as used in the Amendment. Since then, every court of appeals to issue a published Hyde Amendment decision has cited *Gilbert* with approval and has largely adopted *Gilbert*'s definitions. See *United States* v. *Knott*, 256 F.3d 20, 28-31 (1st Cir. 2001), cert. denied, 534 U.S. 1127 (2002); *United States* v. *Schneider*, 395 F.3d 78, 85-86 & n.3 (2d Cir.), cert. denied, 544 U.S. 1062 (2005); *In re 1997 Grand Jury*, 215 F.3d 430, 436-437 (4th Cir. 2000); *United States* v. *Truesdale*, 211 F.3d 898, 908-909 (5th Cir. 2000); *United States* v. *True*, 250 F.3d 410, 422-423 (6th Cir. 2001); *United States* v. *Porchay*, 533 F.3d 704, 711 (8th Cir. 2008); *United States* v. *Braunstein*, 281 F.3d 982, 994-995 (9th Cir. 2002); *United States* v. *Manchester Farming P'ship*, 315 F.3d 1176, 1182-1186 (9th Cir. 2003).

i. Those courts have, in explaining and expanding on *Gilbert*'s definitions of "vexatious," "frivolous," and "bad faith," used slightly varying terms to describe those standards. For example, the Ninth Circuit has explained that "'[v]exatious' has both a subjective and objective element: subjectively, the Government must have acted maliciously or with an intent to harass [the

defendant]; objectively, the suit must be deficient or without merit." *Manchester Farming*, 315 F.3d at 1182; accord *United States* v. *Sherburne*, 249 F.3d 1121, 1126-1128 (9th Cir. 2001). But contrary to petitioner's suggestion, the Ninth Circuit has never "rejected" (Pet. 25, 27) *Gilbert*'s definition of "vexatious." To the contrary, the Ninth Circuit—like the Eleventh Circuit in *Gilbert*—has appropriately looked to the dictionary for guidance, finding that *Black's Law Dictionary* defines "vexatious" both as "without reasonable or probable cause or excuse; harassing; annoying" and as "malicious[ ] and without good cause." *Sherburne*, 249 F.3d at 1126 (citing *Black's Law Dictionary* 1559 (7th ed. 1999)).

Moreover, while *Gilbert* does not state in so many words that "vexatious" has a subjective component, it strongly suggests that, if the question arose in a proper case, the Eleventh Circuit would hold that a malicious motive by the government is required to show that a prosecution was vexatious. See 198 F.3d at 1304 ("Even in its earliest form, the Hyde Amendment was targeted at prosecutorial misconduct, not prosecutorial mistake."). The Eleventh Circuit appears not to have decided the issue. The two courts of appeals to have decided the issue both have held that "vexatious" has a subjective component. See *Knott*, 256 F.3d at 29; *Sherburne*, 249 F.3d at 1126-1128. Thus, there is neither a present division of authority on the question nor any reason to expect disagreement in the future.

ii. Petitioner further complains that the Ninth Circuit has described a "frivolous" position as one that is "obviously wrong." Pet. 25 (citing *Braunstein*, 281 F.3d at 995). But there is no apparent difference between "obviously wrong" and "utterly without foundation in law or fact" (*Gilbert*, 198 F.3d at 1299), nor does peti-

tioner suggest what difference there might be. Indeed, in using the phrase "obviously wrong," the Ninth Circuit said it was *adopting* the Eleventh Circuit's definition. See *Braunstein*, 281 F.3d at 995 ("Because the Eleventh's Circuit's approach to defining 'frivolous' and 'bad faith' is clear and well-reasoned, we join the Fourth Circuit in adopting it."). Similarly, petitioner criticizes (Pet. 26) the Sixth Circuit's definition of "frivolous" as "lacking a reasonable legal basis or * * * lack[ing] a reasonable expectation of attaining sufficient material evidence by the time of trial." *United States* v. *Heavrin*, 330 F.3d 723, 729 (2003). In the Hyde Amendment context, there is no meaningful difference among "lacking a reasonable legal basis" (*ibid.*), "obviously wrong" (*Braunstein*, 281 F.3d at 995), and "without foundation in law" (*Gilbert*, 198 F.3d at 1299). Moreover, *Heavrin* itself approvingly quotes both other formulations in addition to using its own. See 330 F.3d at 728-729.[2]

iii. Petitioner also asserts (Pet. 26-27) that the courts of appeals are divided on the question whether reasonable or probable cause to indict is sufficient to demonstrate that the government's position was not vexatious or frivolous. That contention is incorrect. Courts have appropriately held that where a court reviewing a Hyde Amendment motion concludes that the government had a reasonable basis for pursuing a prosecution, the gov-

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[2] Petitioner claims (Pet. 26) that the Eighth Circuit also defines "frivolous" differently, but the cases he cites use *Gilbert*'s language verbatim. See *United States* v. *Bowman*, 380 F.3d 387, 390 (2004) ("We have stated a position is frivolous for the purposes of the Hyde Amendment when the position is utterly without foundation in law or fact."), cert. denied, 543 U.S. 1056 (2005); *United States* v. *Beeks*, 266 F.3d 880, 883-884 (2001) (defining "frivolous" as "utterly without foundation in law or fact" and citing *Gilbert*).

ernment's position cannot be considered vexatious or frivolous. See, *e.g.*, *Porchay*, 533 F.3d at 711; *United States* v. *Isaiah*, 434 F.3d 513, 519 (6th Cir. 2006). The Ninth Circuit has not held to the contrary; it has held only that a grand jury's decision to indict, standing alone, does not demonstrate that the government's position was not frivolous. *Manchester Farming*, 315 F.3d at 1184. Like the Sixth and Eighth Circuits, the Ninth Circuit holds that where the district court independently concludes that there was reasonable cause for the prosecution, the government's position is not frivolous. *Ibid.*

b. Under any of the cited formulations, the court of appeals' decision is correct. Neither the district court nor the court of appeals found any aspect of the government's case to reflect "bad faith" or to be "vexatious." See Pet. App. 50a-54a (court of appeals); *id.* at 62a-64a (district court). Petitioner offers no reason why the result in his case would be different under some other interpretation of the Hyde Amendment. And this Court does not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)); see *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). There is no such "obvious and exceptional showing" here—or indeed, any showing at all on petitioner's part.

Furthermore, the court of appeals found nothing in the record to support a finding of objectively *or* subjectively frivolous conduct by the government, let alone both. See, *e.g.*, Pet. App. 48a-49a ("The record simply does not substantiate the assertion that the government

knew or had reason to believe that its lack of bone fragments theory was false."); *id.* at 49a ("[T]here is no basis in the record for the district court's statement that the government might have consciously advanced a false theory."); *id.* at 50a (holding there was "nothing improper" about the government's theory of the case); *id.* at 53a ("[H]aving found that the government's advancement of the bone fragment theory was not frivolous, we see nothing further in the prosecution's case to suggest that liability was appropriate under the Hyde Amendment."). Thus, even if the court of appeals had used a purely objective definition of "vexatious" (as petitioner claims the Eleventh Circuit uses), there would still be no factual finding supporting a Hyde Amendment fee award here.[3]

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[3] Petitioner also argues (Pet. 29) that the court of appeals erred in concluding that the government did not engage in the type of misconduct required for a Hyde Amendment award when it relied in good faith on a preeminent expert who did not indicate the need for any further investigation. See Pet. App. 45a-46a. Petitioner acknowledges (Pet. 29) that there is no division of authority on this question. Moreover, the court of appeals explicitly declined to hold that a prosecutor's reliance on an expert can never support liability under the Hyde Amendment. Pet. App. 47a. It held only that "this case does not present such a situation" because there was "nothing" in the facts of the case to suggest that the government's reliance on the expert was frivolous. *Ibid.* The court of appeals' factbound conclusion does not warrant this Court's review.

Similarly misplaced is petitioner's contention (Pet. 30-31) that a Hyde Amendment award was effectively mandatory in light of Congress's "intent that [18 U.S.C. 1347] *not* be used to criminalize differences in medical opinion," and the district court's dismissal of certain Section 1347 counts concerning whether certain surgeries were medically necessary. The question is not (as petitioner would appear to have it) whether the evidence at trial was ultimately insufficient to convict because it showed only a reasonable difference of medical opinion. Rath-

c. The foregoing considerations aside, this would be an unsuitable vehicle for resolving any disagreement on the proper standard for an award under the Hyde Amendment because that provision does not permit a fractional award like the district court made here. Rather, the Hyde Amendment permits only an award "in [a] criminal *case* * * * where * * * *the position* of the United States was vexatious, frivolous, or in bad faith." 18 U.S.C. 3006A note (emphasis added). By speaking of an entire "case" and using the definite article to refer to "the" overall "position of the United States," the Hyde Amendment requires that awards be made only in contemplation of the position of the United States as a whole. The Amendment therefore does not authorize fractional or piecemeal awards based on particular aspects of a criminal case, litigation over specific factual issues within a criminal case, or proceedings in connection with individual motions. See *Heavrin*, 330 F.3d at 730 ("When assessing whether the 'position of the United States was vexatious, frivolous, or in bad faith,' the district court should therefore make only one finding, which should be based on the case as an inclusive whole.") (quoting *Commissioner* v. *Jean*, 496 U.S. 154, 162 (1990)) (some internal quotation marks omitted). Indeed, this Court held in *Jean*, 496 U.S. at 161-162, that fee awards against the government under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, require assessment of the government's position as a whole, and the Hyde Amendment is in part modeled on

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er, as *Heavrin*, 330 F.3d at 729, explains, the question is whether in bringing the prosecution, the government had "a reasonable expectation of attaining sufficient material evidence by the time of trial" on the question of petitioner's intent to defraud (see Pet. App. 25a, 50a). That factbound issue does not warrant review.

the EAJA, and subject to the EAJA's procedures, see *Manchester Farming*, 315 F.3d at 1182.

Neither of the courts below suggested that the United States' position as a whole was "vexatious, frivolous, or in bad faith." At most, the district court accepted that the Hyde Amendment standard was met "in regards to those claims based on lack of bone [fragments]." Pet. App. 64a. But as *Heavrin* explains, "[a] count-by-count analysis [of the government's position] is inconsistent with [*Jean*'s] approach." 330 F.3d at 730. Petitioner fails to explain why *Heavrin* is incorrect, or why this Court should undertake to review the factual conclusion of both courts below, see *Exxon*, 517 U.S. at 841, that the government's position as a whole was not "vexatious, frivolous, or in bad faith."[4]

2. Petitioner also asserts (Pet. 31-33) that lower courts are divided over the availability of discovery under the Hyde Amendment. That contention is mistaken. The courts of appeals have consistently held that although a district court may have the discretion to order limited discovery in certain circumstances, the Hyde Amendment does not permit discovery as of right, and a Hyde Amendment movant must at least make a threshold showing that liability under the Amendment is likely.[5] The court of appeals here followed that con-

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[4] Although the government argued in the court of appeals that this was a sufficient basis on which to reverse the district court's fee award, the court of appeals instead reversed on the facts. See Pet. App. 42a.

[5] See *Schneider*, 395 F.3d at 91-92 ("We need not decide whether, upon a sufficient threshold showing, a court may order the production of government materials either to the defendant, or to the court for *ex parte* and *in camera* inspection. Schneider, lacking evidence that even raised a likelihood of government liability, hoped to make his case by requiring the government to disclose its confidential materials to the

sensus view. See Pet. App. 54a-55a. And as the court of appeals explained, the district court properly denied petitioner's request for discovery into the prosecutors' bad faith because petitioner "failed to present any evidence to the district court supporting his allegations of bad faith." *Id.* at 55a.

3. Finally, petitioner asserts (Pet. 33-35) that the court of appeals' application of clearly erroneous review conflicts with a previous Ninth Circuit case, *United States* v. *Hinkson*, 585 F.3d 1247 (2009) (en banc), and this Court's decision in *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985). Those contentions do not warrant review in this case.

As an initial matter, even if the court of appeals' decision were inconsistent with *Hinkson*, that would merely reflect an intra-circuit conflict for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 901 (1957) (per curiam). In any event, there is no inconsistency: The court of appeals amended its opinion on rehearing precisely to address *Hinkson* (compare Pet. App. 13a with *id.* at 41a), and it cited and faithfully applied *Hinkson* (see *id.* at 41a, 42a, 48a-49a).

Furthermore, *Hinkson* itself is consistent with *Anderson*. *Hinkson* holds that a court of appeals may properly reverse a district court's application of law to

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court. We are confident that in such circumstances, the Hyde Amendment does not compel such production."); *United States* v. *Lindberg*, 220 F.3d 1120, 1126 (9th Cir. 2000) (denying discovery because defendant's Hyde Amendment motion was based on nothing but "his assertion that the government lacked sufficient evidence to convict him of conspiracy"); *Truesdale*, 211 F.3d at 906-907 (holding that Hyde Amendment does not provide for discovery as a matter of right but finding it unnecessary in the circumstances of the case to "determine the situations under which discovery or a hearing is allowed or required, assuming either is allowed at all").

fact as an abuse of discretion when "the district court's findings of fact, [or] its application of those findings of fact to the correct legal standard, were illogical, implausible, or without support in inferences that may be drawn from facts in the record." 585 F.3d at 1251. That is consistent with *Anderson*, which held that the court of appeals incorrectly reversed the district court after concluding that its findings were clearly erroneous, because the district court's interpretation of the facts was not "illogical or implausible" and had "support in inferences that may be drawn from the facts in the record." 470 U.S. at 577.

Petitioner appears to take issue (see Pet. 34) with *Hinkson*'s further statement that "even when a court of appeals determines a trial court's findings are 'permissible' * * * or not a 'mistake' * * *, the court of appeals must *reverse* if the district court's determination is 'illogical or implausible' or lacks 'support in inferences that may be drawn from facts in the record.'" 585 F.3d at 1261. The import of this statement is not entirely clear; it is not obvious why a reviewing court might think a lower court's findings were "permissible" but nonetheless "illogical." But *Hinkson* goes on to recast this statement in unexceptionable terms: that if the district court's determination is illogical, implausible, or unsupported, "only then [is the court of appeals] able to have a 'definite and firm conviction' that the district court reached a conclusion that was a 'mistake' or was not among its 'permissible' options," and must therefore be reversed. *Id.* at 1262. Petitioner expresses no disagreement with that formulation.

More to the point, the court of appeals' discussion is nothing but a precise and thorough application of principles this court articulated in *Anderson*, and for that rea-

son, it does not warrant further review. Nothing suggests the court of appeals thought the district court's finding of frivolousness was "permissible" or anything but a "mistake." The court of appeals expressly stated its own view of the record: "The district court's finding that [the government's belated discovery of the flaw in its bone-fragment theory] was misconduct of the sort that could justify a fee award * * * goes too far." Pet. App. 44a; see *ibid.* ("[T]here is no evidence that the government had any affirmative reason to believe its bone fragments theory was wrong."); *id.* at 47a ("There is nothing * * * about the facts surrounding the prosecutors' reliance on Dr. Rice that suggests that this reliance was frivolous."). And in a portion of the opinion distinct from that discussion, the court of appeals went on to explain, as a separate matter, that the district court's key "finding * * * [wa]s implausible based on the record," *id.* at 48a, and that another of the district court's statements had "no basis in the record," *id.* at 49a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court of the United States

MARK CAPENER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Argument

I. The Hyde Amendment, the Department, and the Case

The government's opposition is an odd product to receive from the Solicitor General's office at the certiorari stage, as its brief focuses on the merits, rather than criteria for certiorari. The government contends that the Ninth Circuit was "correct" (Opp.8), and glosses over the divisions among the lower courts as not "meaningful" (Opp.10), or not "outcome-determinative" (Opp.8) in this case. It even injects an entirely new question–not reached by the court of appeals, or raised in the Petition–that is argued to support the result (Opp.13-14). (See Point IV, below).

However, at the certiorari stage, the primary consideration is not whether the decision below is correct, but whether the questions presented are sufficiently important to warrant this Court's attention. The Petitioner believes that the appellate reversal of the district court's award was incorrect, and that the award should have been enlarged on appeal. But full development of those arguments requires a merits briefing; the immediate question is whether this Court should take up the case.

In this regard, the Court should consider that the government's incentives in this case differ from most other cases presented for this Court's review, given the focus of the case on the fee-shifting Hyde Amendment. The Solicitor General is part of the same Department whose activities are the primary

regulatory target of the statute, and the Department's responsibility is institutional and financial: awards under the Hyde Amendment are payable from the prosecuting agency's previously appropriated funds, and "[n]o new appropriations shall be made as a result of this provision," 18 U.S.C. § 3006A note (set forth at Pet.3-4). Therefore, the Department's incentives in this case are more like those of an interested private party, and do not reflect the usual degree of detachment from the result.

The Department has been a constant foe of the Hyde Amendment, before and after its enactment in 1997. So far as we are aware, the Department follows a practice of opposing virtually all Hyde motions, and appealing virtually all Hyde awards, no matter what the underlying conduct.[1] The resultant confusion in the lower courts (discussed in Point II, below), coupled with deferential standards of review, have managed to keep the Hyde Amendment away from this Court's consideration for 13 years, and the Department seeks to prolong that result here. All of this is understandable from the perspective of an frequent litigant whose self-interest is at stake, and is

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[1] See note 2, below. The most notable but partial exception is *United States v. Aisenberg*, 358 F.3d 1327 (11th Cir. 2004), where a husband and wife were indicted in connection with the disappearance of their own child. The Department conceded Hyde liability, but contested the amount and resisted full disclosure of its own activities.

naturally inclined to defend its own agents' actions. But it has little to commend itself from in terms of the public interest in ensuring the ethics and fairness of the prosecution function, or fidelity to the Congressional policy to compensate victims of federal prosecutorial overreach.

In this case, the Petitioner Dr. Capener was prosecuted for what amounted to a "statistical" offense, i.e., that he performed more of a given type of surgical procedure than the average as computed by a health insurance carrier. Even if one assumes that divergence from the mean was enough to open a file, the prosecution failed to develop any further facts during three years of pre-indictment investigation, with the unlimited resources of the federal government and unlimited access to patients' medical records, *see* 18 U.S.C. § 3486. A modicum of factual investigation would have revealed two fatal defects, which together demolished the entire basis for the prosecution: (1) the indictment's allegation that Dr. Capener's surgeries were "unnecessary" because patients "could have been treated medically without surgery" was a lie, as shown unambiguously by the patients' prior medical histories; and (2) one of the principal (though undisclosed) assumptions for alleging that Dr. Capener's surgeries were "not done" also was false, as shown unambiguously by examining the actual pathology samples taken. The prosecution's failure to uncover these simple facts certainly was incompetent and unethical. The basic question is whether the resultant expense to the defendant is compensable under the Hyde Amendment.

The case is an appropriate vehicle for review because its extensive record documents the catastrophic consequences that follow upon prosecutors' failure to do a minimally competent and ethical job. Instead of investigating the simple facts, the prosecution pressed its case without facts, through uninformed expert opinion, and opposed the revelation of facts every step of the way, forcing Dr. Capener to prove his innocence, at the cost $1.4 million to him, and untold further millions of wasted taxpayer dollars. These are only part of the consequences, even to Dr. Capener, whose life and medical practice were uprooted, and enmeshed in civil and regulatory entanglements for years. But the most important costs are to the credibility of the federal criminal process itself.

This is because Dr. Capener's case regrettably is not so unusual, and the public is aware of that fact. According to a recent investigative series published by *USA Today*, it has documented over 200 cases of judicially-acknowledged misconduct by federal prosecutors since the Hyde Amendment was enacted, and even that may be a small sample of the actual incidence.[2] Very few such cases have produced Hyde compensation, which has led to

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[2] The articles appeared from September through December 2010, and may be accessed, together with the underlying documentation, under the series title of "Misconduct at the Justice Department," at www.usatoday.com /news/ Washington /judicial/2010-09-22-federal-prosecutors-reform_N.htm?loc=interstitialskip.

criticism that "the scarcity of compensation wins, amid a rise in misconduct charges, shows the law's not working."[3] The Department continues to defend its own self-policing efforts, but those too have been criticized, by a former U.S. Attorney, as "very, very poor. . . . serious discipline is basically non-existent."[4]

The history of the Hyde Amendment in the lower courts has produced neither uniform doctrine nor public confidence in the efficacy of this Congressionally-prescribed remedy for prosecutorial abuse. Perhaps the fault lies in the statute itself, or perhaps not. Either way, the definitive answer can come only from this Court.

II. Dissonance in the Lower Courts

The government's brief seeks to minimize the differing formulations of the Hyde Amendment standards in the lower courts, essentially arguing that differences in doctrine do not necessarily produce divergences in results. This too is a strange argument within a legal tradition governed by words. In any case, it contradicts what the courts of

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[3] "Not Guilty, But Stuck with Big Bills, Damaged Career," *USA Today*, September 27, 2010.

[4] "Federal Prosecutors Likely to Keep Jobs After Cases Collapse," *USA Today*, December 8, 2010 (quoting Joseph diGenova, former U.S. Attorney for the District of Columbia).

appeals themselves say, as, for example, in the First Circuit's *Knott* decision:

> "Circuit courts . . . have varied in interpreting the term 'vexatious.' The Gilbert court, for instance, relies on a[n] [objective] definition . . . . By contrast, the Ninth Circuit, in *United States v. Sherburne* . . . requires both [objective and subjective components]. . . . Other courts have utilized a standard more amenable to the party seeking fees. . . . [W] e reject the approach of Sherburne to the extent it suggests that such attention to subjective motivation is required."

United States v. Knott, 256 F.3d 20, 29-30 (1st Cir. 2001) (actually rejecting both *Gilbert* and *Sherburne*). Similarly, the Second Circuit's decision in *United States v. Schneider*, 395 F.3d 78 (2d Cir. 2005), not only declines to adopt any of the competing definitions of "vexatious, frivolous, or in bad faith," 395 F.3d at 86, but also explicitly notes that the decisions on discovery criteria "have reached differing conclusions," *id.* at 91. Thus, there are at least three (or four) different definitions of "vexatious," at least two of "frivolous," and two of "bad faith," as well as disagreements on discovery and fact-finding. (*See* Pet.24-28).

The government therefore is wrong in its contention that this Court should ignore the lower courts' divisions. But even those divisions are only part of more profound problems, because the lower

courts have confused the interpretation of the Hyde Amendment–essentially, a federal statutory question–with entirely distinct doctrines of constitutional law:

A. *"Probable Cause" and the Hyde Amendment.* In our law, "probable cause" is primarily a Fourth Amendment standard governing the constitutionality of arrest or search, and secondarily a standard of proof applicable in the grand jury or at preliminary hearing. Neither sense tracks with the purpose of the Hyde Amendment, which is a federal statutory standard, above constitutional minima. The government argues that "probable" or "reasonable" cause ought to be assimilated to the statutory standards of "frivolous" or "vexatious." (Opp.10-11). On this point, both the language and the sparse legislative history of the statute are directly to the contrary: if "probable cause" could defeat an award, then the statute could have no application whatever to an indicted offense, which would wholly defeat the statute's intent. Thus, at least the Sixth and Eighth Circuits, and, according to the government's argument, the Ninth Circuit (*see* Opp.11), are wrong. More fundamentally, the use of a predominantly Fourth Amendment standard has and will produce confusion in the lower courts, and needs to be rooted out.

B. *Prosecutorial Misconduct versus Prosecutorial "Mistake."* A second profound error can be traced back to the early *Gilbert* decision by the Eleventh Circuit, which coined the shibboleth that "the Hyde Amendment was targeted at prosecutorial misconduct, not prosecutorial mistake," *United*

States v. Gilbert, 198 F.3d 1293, 1304 (11th Cir. 1999). Even on its face, the phrase is problematic, as mistakes and misconduct are not necessarily mutually exclusive. It also was a saying invented by Judge Carnes to sum up a highly questionable exercise in legislative history construction, including such things as protest letters from Justice Department officials and newspaper articles, *see id.* at 1299-1303. But most fundamentally misguided was *Gilbert*'s particular version of "prosecutorial misconduct" as assimilated to the doctrine developed under the Due Process Clause of the Fourteenth Amendment, as exemplified by cases such as *Brady v. Maryland*, 373 US. 83 (1963). *See Gilbert*, 198 F.3d at 1304-05. Noting this Court's refusal to extend *Brady* to the federal grand jury phase, solely based on its inherent supervisory powers, *United States v. Williams*, 504 US. 36 (1992), the *Gilbert* court reasoned that such failures also could not suffice under Hyde, *see Gilbert*, 198 F.3d at 1305. This reasoning is profoundly wrong, because the Hyde Amendment was neither an expression of Fourteenth Amendment doctrine–applicable in both state and federal courts– nor a manifestation of this Court's inherent supervisory power, but rather was a Congressional enactment designed to provide an independent federal statutory remedy applicable only to federal prosecutors. Moreover, the particular application was wrong in content, because federal prosecutors *are* required by Justice Department standards to present exculpatory evidence to the grand jury. *United States Attorneys' Manual* 9-11.233.

The myopia displayed by *Gilbert* exemplifies the lower courts' failure to follow the Hyde Amendment's intent to operate as a check on federal prosecutorial overreach. Congress did not intend to standards of federal prosecution to the lowest-common-denominator of due process minima. Congress properly exercised its authority to demand better performance from the federal prosecutor, and the lower courts have not been faithful to that intent.

III. The Dangerous Precedent of a "Reliance on Experts" Defense

The government seeks to denigrate by footnote (Opp.12n.3) the disturbing implications of the court of appeals' ruling that the government may defend against a Hyde award by "reliance" on a hired expert, such as Dr. Rice, who is at least negligent, if not perjurious. This was both a factual and legal dispute between the parties, and between the district court and the court of appeals: the district court found not only that Dr. Rice was negligent, but also that the prosecutor had reason to know that Dr. Rice was wrong. It is unclear whether the court of appeals' reversal was partly factual, or entirely legal. But either way, it pollutes the Hyde Amendment with an alien and dangerous concept.

The standard of Hyde Amendment responsibility is an institutional one, based upon the "position of the United States." This language indicates that the "position of the United States" must include the position of anyone designated to speak for the United States, such as Dr. Rice. The

Ninth Circuit's holding contradicts that principle, by ruling that the government's position could be considered non-frivolous even where the position of its hireling was frivolous.

Whatever the merits of such a view in other contexts, such as civil litigation, this is an untenable ruling in criminal cases under the Hyde Amendment, because it invites the Department to delegate federal prosecutorial decisions outside of the Executive Branch, and outside the government entirely, by buying and paying for an expert, essentially as "cover" for a frivolous prosecution. This cannot be what Congress intended.

With few and limited exceptions, the federal prosecution function may not be delegated outside the Executive Branch, much less outside the government:

> "Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. . . . For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice."

Young v. United States ex rel. Vuitton Et Fils SA, 481 U.S. 787, 814 (1987). This principle is violated by allowing the Department to hide behind an "expert" hired to assess the factual basis for prosecution. It requires no great imagination to see the abusive

potential: nearly any federal prosecution can be "expertised" through "forensic science" or the like.

This case presents the issue in a severe form. Here the district court found as a fact that the government actually did not "rely" on Dr. Rice's fabrication (Pet.61a-63a), and that finding was amply supported in the record. So, the court of appeals' reversal was legal error, contrary to this Court's clear error precedent. (See Point V, below). But even aside from that point, no one will miss the implications for future cases. The "expertise" involved here was not exotic: any prosecutor conducting a medical case knows that the best evidence of a pathology sample is the slide itself, which in this case showed that Dr. Rice's theory was obviously false. Similarly, any prosecutor conducting a medical case knows better than to fabricate allegations about medical history without looking at the patients' medical records. To allow the "expertise" dodge to succeed in these circumstances is to build a superhighway for prosecutorial abuse.

IV. The Government's New Question

Another strange feature of the government's brief is its introduction of a new point (1.c of its Argument) contending that the Hyde Amendment "does not permit a fractional award like the district court made here." (Opp.13). The argument is procedurally irregular, and contributes nothing to certiorari consideration.

This point was first raised on appeal, and not preserved in the district court. The court of appeals never reached the issue (Pet.41a-42a), and it is not included in the Petition's questions presented (Pet.i-ii). Ordinarily, raising such a new question would require a cross-petition, but the Petitioner would not object to its consideration in a merits briefing. If this Court takes jurisdiction, it may consider the government's argument as an alternative ground for affirming the judgment below, and the Petitioner agrees that it too presents an important federal question. But it cannot support a denial of certiorari: because the court of appeals did not even reach the issue (and the district court was not presented with it), there is no decision to leave in place.

V. The "Clearly Erroneous" Standard and Fact-Boundedness

Any lawyer who has briefed more than a few certiorari petitions is familiar with the government's inveterate invocation of the "fact-bound" argument against review. (*See* Opp.7, 11-12, 15). However, incanting that saw is a bad choice here, as the court of appeals' application of a novel and deviant Ninth Circuit reformulation of clear error review to reverse the district court's findings of fact presents a pure question of law and a direct conflict with this Court's ruling decision in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), on a matter of exceptional importance to federal practice generally.

The government misstates both the case and the law by invoking this Court's reticence to review "concurrent findings of fact" (Opp.11). This petition does not question "concurrent" findings; it involves *conflicting* findings by the two lower courts–as the court of appeals reversed the district court's findings–which is why there is a legal question of clear error review. The same situation of appellate reversal of district court findings was involved in *Anderson* itself, and is the appropriate posture in which to review appellate courts' application of clear error doctrine.

Even the government concedes that the newly-minted Ninth Circuit standard of clear error is somewhat lacking in coherence (Opp.16). Its application here is even more problematic: as shown by the government's own description, the author of the court of appeals' panel decision–a district judge, sitting by designation–did not observe any variation of clear error review, instead opining that the district court finding "goes too far" (Opp.17).

The decision below creates a direct conflict with this Court's *Anderson* decision, and warrants review for that reason alone. However, the conflict is much deeper, given that the decision in this case applies a recent en banc decision announcing a new standard for our largest Circuit, and a standard that is predicated on a challenge to this Court's previous decisions. (*See* Pet.33-35).

Conclusion

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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